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IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

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No. 166.
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ARTHUR J. DAHN, PETITIONER,

vs.

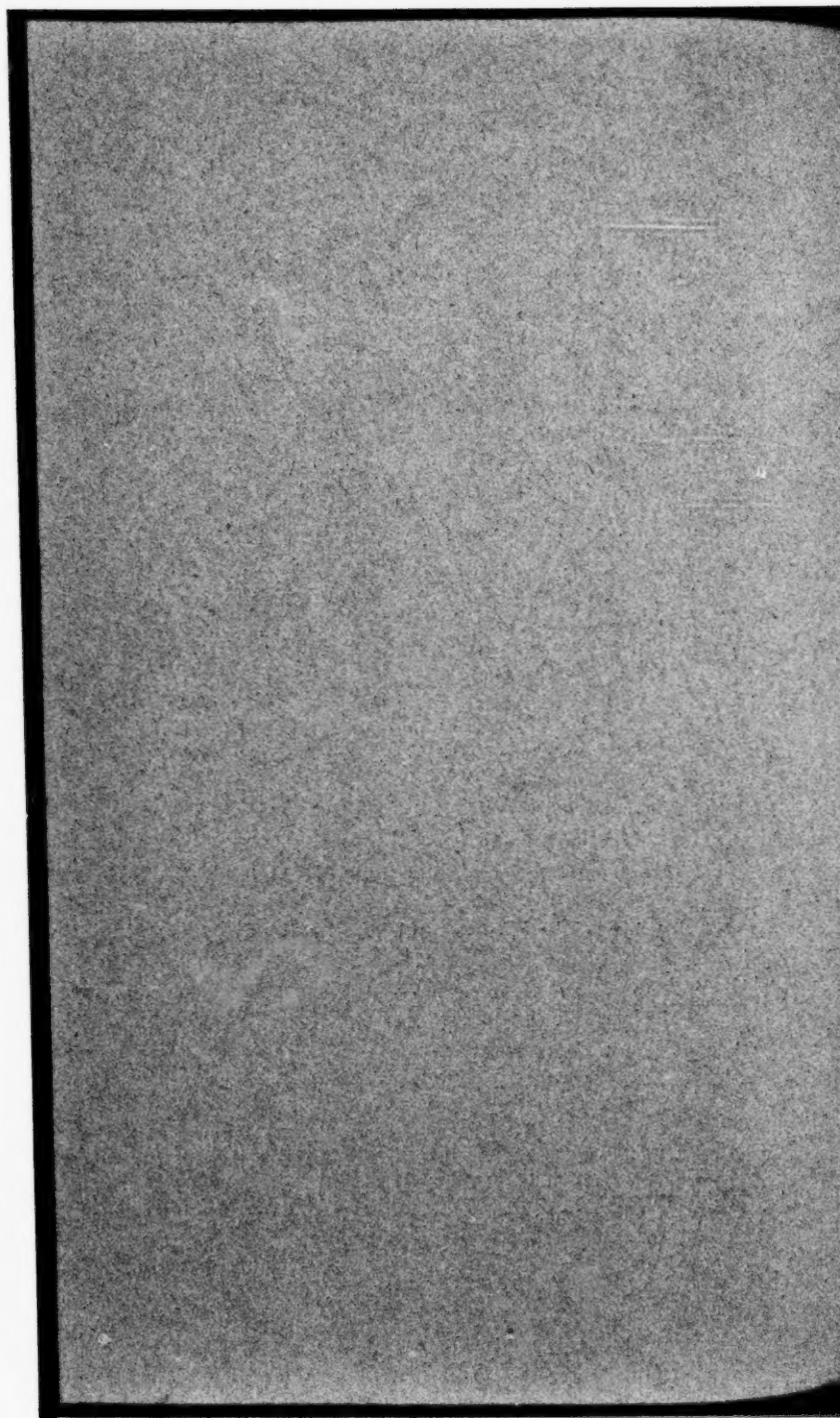
JAMES C. DAVIS, AGENT DESIGNATED BY
THE PRESIDENT, UNDER SECTION 1901 OF
THE TRANSPORTATION ACT, APPROVED
FEBRUARY 28, 1920, RESPONDENT.

—
BRIEF FOR PETITIONER.
—

WALTER G. OLEPHANE,

J. WILMER LATIMER,

Attorneys for Petitioner.



INDEX.

	Page
Statement of Facts.....	1
Assignment of Errors.....	3
Argument.....	4
First Assignment of Error.....	4
Assignments of Error, Nos. 2, 5, 6, and 7.....	5
A. Is the Director General of Railroads liable in an Action of this character when a claimant has not availed himself of the benefits of the Federal Employees' Com- pensation Act?.....	6
B. Does the receipt of benefits under the Compensation Act constitute an election so as to bar a claimant of his remedy?....	12
1. There is nothing in the Control Act or Compensation Act to require an election.....	16
2. If the language of Section 10 of the Control Act is ambiguous the history of the legislation can be resorted to. This shows that such a result was never intended.....	19
3. The Federal Employees' Compensa- tion Act differs in important particu- lars from the legislation of those state and English and Scotch Acts above cited by the Court.....	24
C. Must the claimant refund to the Govern- ment the amount recovered?.....	27
Effect of Decision.....	33
Conclusion.....	37
Appendix (Pertinent excerpts from the Compensa- tion Act.).....	38

Table of Cases.

	Page
Alabama <i>vs.</i> Montague, 117 U. S., 602, 609, 611, 29 L. Ed., 1000.....	17
8 A. L. R., 969.....	8
Bigby <i>vs.</i> U. S., 188 U. S., 400, 47 L. Ed., 519.....	15
Black <i>vs.</i> Ch. & G. W. R. R. Co., 174 N. W., 774.....	16, 27
Book <i>vs.</i> Henderson, 197 S. W., 1449.....	32
36 Cyc., 1119, 1120.....	17
Duplex Printing Press Co. <i>vs.</i> Deering et al., 254 U. S., 443.....	19
Haubert <i>vs.</i> B. & O. R. R. Co., 259 Fed., 361.....	14
Houlihan <i>vs.</i> Sulzberger & Sons Co., 118 N. E., 429	30
Johnson <i>vs.</i> McAdoo, 257 Fed., 757.....	13
Lancaster <i>vs.</i> Hunter, 217 S. W., 765.....	16
Mercer <i>vs.</i> Ott, 89 S. E., 952.....	32
Mo. Pac. R. R. Co. et al. <i>vs.</i> Ault (June 1, 1921).....	8, 22
N. P. Ry. Co. <i>vs.</i> Meese, 239 U. S., 614, 60 L. Ed., 467.....	29
Otis Elevator Co. <i>vs.</i> Miller & Paine, 240 Fed., 376	31
Panama Railroad Co. <i>vs.</i> Curran, C. C. A., 5th Cir., 256 Fed., 768.....	22
Shade <i>vs.</i> Ashgrove Lime, etc., Co., 92 Kans., 146, 139 Pac., 1193.....	25
Slocum <i>vs.</i> N. Y. Life Insurance Co., 228 U. S., 364, 57 L. Ed., 879.....	4
So. Surety Co. <i>vs.</i> Ry., 174 N. W., 329.....	16, 26, 27
Turnquist <i>vs.</i> Hannon, 219 Mass., 560, 107 N. E., 443.....	25
U. S. <i>vs.</i> Bevans, 3 Wheat., 336, 339, 4 L. Ed., 404	17
Vaughn's Case, 81 So., 417.....	7
Wilson <i>vs.</i> Sandford, 10 How., 99, 101, 13 L. Ed., 344.....	17

Miscellaneous Citations.

	Page
Federal Employees' Compensation Act (Chapter 458, 1st Session, 64th Congress), 39 Stat. L., 742.....	3, 16, 17, 18, 28, 34
Federal Control Act, 40 Stat. L., 451.....	6, 7, 8, 12, 13, 14, 22
Pertinent Excerpts from Compensation Act.....	38
Sec. 2477 M 6 Iowa Statutes.....	16
Ill. Compensation Act, Laws 1911, p. 316 et seq.....	16, 30, 31
Tex. Gen. Laws, 1917, p. 285, Vernon's Anno. Civil Code Stat. Supp., 1918, Art. 5246-47.....	16
Ohio Stat. (Acts, 1911, p. 524 and Amended Acts, 1913, pp. 72, 396).....	32
Gen. Order No. 50.....	10
Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 65th Congress, Second Session on H. R. 8172.....	19, 20
Bulletin U. S. Bur. Labor Statistics No. 272, pp. 193, et seq. (Jan., 1921).....	29, 32
Bulletin U. S. Bur. Labor Statistics, No. 275, p. 41 (Sept., 1920).....	25
27 Compt. Dec., Part 1, p. 179, Aug. 18, 1920.....	35



IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 166.

ARTHUR J. DAHN, PETITIONER,

vs.

JAMES C. DAVIS, AGENT DESIGNATED BY
THE PRESIDENT, UNDER SECTION 206 OF
THE TRANSPORTATION ACT, APPROVED
FEBRUARY 28, 1920, RESPONDENT.

BRIEF OF PETITIONER.

Statement of Facts.

Petitioner was a railway mail clerk in the employ of the United States Government. He brought this action in the District Court of the United States for the Northern District of Iowa, against the Illinois Central Railroad Company and the Director General of Railroads of the United States, to recover damages for personal injuries sustained May 29, 1918, while engaged in the performance of his duties on a mail car attached to a train on the lines of the Illinois Central Railroad Company. Said railroad was being operated at the time under the direction of the Director General of Railroads (Rec., p. 2). The car was wrecked by plunging through a bridge constituting part of the road-bed of said railroad company, and plaintiff was seri-

ously and permanently injured (Rec., pp. 32-38). The negligent acts charged were:

(a) The dangerous and unsafe construction and maintenance of the said railway bridge.

(b) The operation of the train at an excessive and unsafe rate of speed.

(c) The failure to adequately patrol the track and give proper warning of its dangerous condition (Rec., pp. 2-3).

The petition alleged diversity of citizenship, and invoked federal jurisdiction on that ground (Rec., p. 2). Counsel for the Director General conceded the allegations of the petition in this regard to be true (Rec., pp. 39-41).

The Director General in his answer denied petitioner's allegations of negligence and the extent of petitioner's injuries, and also contended (Rec., pp. 19-21):

(a) That the suit is in effect an action against the United States Government, which is not liable in such a case.

(b) That the plaintiff, being an employee of the United States, had prior to the commencement of the action, applied for and received the benefits of the Federal Employees' Compensation Act, and that this constituted an election to proceed exclusively under that act and barred his right to recover in this suit.

(c) That any recovery which might be had in this suit, would be a recovery from the United States Government and, under the terms of the Federal Employees' Compensation Act, the amount of such recovery would have to be refunded to the Government, so that in no event could the petitioner benefit thereby.

The Illinois Central Railroad Company filed no answer because, on motion of the two defendants (Rec., pp. 4-7), that company was dismissed from the cause

(Rec., p. 8) on the ground that under "General Order No. 50" (Rec., pp. 7-8) issued by the Director General of Railroads, suits could not be brought against a railroad company "controlled and involuntarily taken over by the United States" (Rec., p. 4), and that under the terms of that order suit should be brought against the Director General alone (Rec., pp. 4-5).

Defenses (a), (b) and (c) above mentioned were presented to the District Court by appropriate demurrers, and the points thus raised were decided against the Director General. To these rulings exceptions were duly taken. The case was tried before a jury upon the issues joined as to the allegations of negligence and extent of injuries, and plaintiff recovered a verdict in the sum of seven thousand five hundred (\$7,500) dollars (Rec., p. 89).

The Director General appealed from the judgment of the District Court entered upon the verdict of the jury, to the United States Circuit Court of Appeals for the Eighth Circuit (Rec., p. 95), and that court on August 2, 1920, reversed the judgment below, and remanded the case *with directions to dismiss the complaint* (Rec., pp. 110, 111).

Assignment of Errors (Rec., pp. 111, 112).

The errors of the Circuit Court of Appeals relied upon are as follows:

1. In entering judgment reversing the judgment of the District Court of the United States for the Northern District of Iowa and in remanding the case with directions to dismiss the complaint.

2. In not affirming the judgment of the United States District Court aforesaid.

5. In holding that petitioner having applied for and received compensation under Chapter 458 of the First Session of the Sixty-fourth Congress, 39 Statutes,

page 742, is barred from maintaining this suit (Rec., p. 109).

6. In holding and deciding that, as to the United States, the Employees' Compensation Act aforesaid is exclusive of the right to sue the carrier under Federal control if the employee (in this case the petitioner) elects to pursue the remedy under it, and that he can not pursue any other remedy (Rec., pp. 109, 110).

7. In rendering judgment against this petitioner (former defendant in error) for costs of suit in said Circuit Court of Appeals.

ARGUMENT.

First Assignment of Error.

It is believed that the action of the Circuit Court of Appeals in remanding the case to the District Court *with directions to dismiss the complaint* (Rec., pp. 110, 111), is so palpably error as to require no argument. This honorable court in the case of *Slocum vs. New York Life Insurance Company*, 228 U. S., 364, 57 L. Ed., 879, said with regard to a similar mandate (pp. 398, 399):

"In the present case certain well defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion, or ordered by the appellate court for error of law. . . . The reversal operated to set aside the verdict and to put the issues at large as they were before it was

given. But, instead of ordering a new trial, as was required at common law, the Circuit Court of Appeals itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the Seventh Amendment, which not only preserves the common law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than 'according to the rules of the common law.' "

Assignments of Error Nos. 2, 5, 6 and 7.

These assignments will be discussed under three heads, to wit:

A.

**IS THE DIRECTOR GENERAL OF RAILROADS
LIABLE IN AN ACTION OF THIS CHARACTER
WHEN A CLAIMANT HAS NOT AVAILED
HIMSELF OF THE BENEFITS OF THE FED-
ERAL EMPLOYEES' COMPENSATION ACT?**

B.

**THE FIRST QUESTION BEING ANSWERED IN
THE AFFIRMATIVE, DOES THE RECEIPT OF
BENEFITS UNDER THE COMPENSATION ACT
CONSTITUTE AN ELECTION SO AS TO BAR
A CLAIMANT OF HIS REMEDY?**

C.

**THE SECOND QUESTION BEING ANSWERED
IN THE NEGATIVE, MUST CLAIMANT RE-
FUND TO THE GOVERNMENT THE ENTIRE
AMOUNT RECOVERED?**

Taking up these questions in the order above stated:

A.

**IS THE DIRECTOR GENERAL OF RAILROADS
LIABLE IN AN ACTION OF THIS CHARACTER
WHEN A CLAIMANT HAS NOT AVAILED
HIMSELF OF THE BENEFITS OF THE FED-
ERAL EMPLOYEES' COMPENSATION ACT?**

To determine what right of recovery there may be for injuries received on railroads under the operation of the Director General of Railroads, resort must be had to Section 10 of the Act of March 21, 1918, known as the Federal Control Act (40 Stat., 451). This section provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no

process, mesne, or final, shall be levied against any property under such Federal control." (Italics ours.)

It has been contended by the respondent that when the Federal Control Act provided that—

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" (sec. 10),

the word "carrier" must be held to refer to the railroad company which had been operating the road prior to Federal control, and that inasmuch as it had been decided that such an interpretation would make the act unconstitutional, there is no support for the view that this section authorizes suits to be brought against the Director General. The argument is that if the word "carrier" is construed to mean solely the companies whose lines have been taken over by the Federal Government it would not be within the power of Congress to subject them to liability which might arise during their operation under Federal control, because "such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law" (Vaughn's case, 81 South., 417).

The principle is so firmly settled in our jurisprudence as to admit of no denial, that, if possible, every act of Congress should be given a construction that would render it constitutional rather than unconstitutional. If the word "carrier" can properly be construed, not to refer to the *companies* whose lines were, within the purview of section 10, to be operated under Federal control,

but to the transportation systems operated by the Director General, no criticism against the constitutionality of the act can properly be made.

It had been previously decided in this case upon the motion of the Director General (Rec., pp. 4-8), that the railroad could not defend, but that the only defendant must be the Director General. Having accomplished the dismissal of the railroad company from the suit, the Director General then advanced what the annotator in the note in 8 A. L. R., 969, calls "the novel proposition," that because the suit is now against the Director General alone it *can not be maintained at all*, because this would amount to permitting the United States to be sued.

Since the decision of this case below, this honorable court has conclusively settled this proposition in favor of the contention which is now being made by petitioner. In the case of *Mo. Pac. R. R. Co. et al., vs. Ault*, decided June 1, 1921, this court said, construing section 10 of the Federal Control Act above referred to:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit has arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers.

The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term 'carriers' was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in Section 1 declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such (Bull. No. 4, p. 113). Each system was required to file its own tariffs. General Order No. 7, Bull., 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, id. p. 170. Each Federal treasurer was to deal with the finances of a single system; his bank account was to be designated '(Name of Railroad), Federal Account.' General Order No. 37, id. p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, id., pp. 198, 200. And throughout the orders and circulars there are many such expressions as 'two or more railroads or boat lines under federal control.' See General Order No. 11, id. p. 170. It is this conception of a transportation system as an entity

which dominates Section 10 of the Act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the Government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the Government.

"Thus, under Section 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the Government was operating the system the carrier while under federal control was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See *Gracie vs. Palmer*, 8 Wheat., 605, 632, 633, 5 L. Ed., 696, 703."

It would seem that the Director General of Railroads must have had the same idea in mind when he promulgated his General Order No. 50, which contained the following provisions: (Rec., pp. 7, 8).

"It is Therefore Ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the pos-

session, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

"Subject to the provisions of General Orders numbered 18, 18-A, and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceedings may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The decision in the Ault case makes it unnecessary to cite the numerous decisions of the State and Federal courts which also support the view for which petitioner is here contending.

B.

**DOES THE RECEIPT OF BENEFITS UNDER THE
COMPENSATION ACT CONSTITUTE AN ELEC-
TION SO AS TO BAR A CLAIMANT OF HIS
REMEDY?**

If this were a suit against the Government of the United States in the ordinary sense, so that a judgment would have to be paid out of its public moneys derived through its taxing power and other ordinary sources of revenue, then it would follow that the judgment in this case would be paid out of the public moneys generally, the same source from which beneficiaries under the Compensation Act derive their compensation. This, however, is not the case. The railways while under Federal control were never considered to be an integral part of the Governmental system. In consenting that the Director General might be sued, Congress provided in the Control Act an elaborate scheme whereby judgments should be paid out of the railway operating income under the rules of the Interstate Commerce Commission.

Section 12 of the Control Act, dealing with the disposition of the revenue derived from the operation of the roads during Federal control, enacts that (40 Stat., 457):

“Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before the Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct. . . .”

As showing that this judgment would, in regular course, under the rules of the Interstate Commerce Commission be paid as part of the "operating expenses" mentioned in the act, before being covered into the United States Treasury, an extract is here inserted from the opinion of the District Court (La.), in *Johnson vs. McAdoo*, 257 Fed., 757:

"It will be incumbent upon the Director General to defend the suit, and to make such payment, in the event of a recovery, out of his receipts. Section 12 of the act provides that the moneys received by the Director General shall not be covered into the Treasury of the United States, but shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner, as before Federal control. Under the orders of the Interstate Commerce Commission judgments for damages are chargeable to the operation of the roads and are payable out of the general receipts. There is no doubt that the same action will follow in the event of a recovery in this case, as if the roads were not under Government control, and the question of an adjustment as between the Government and the railroad is one that will come up and be settled when the roads are turned back to their owners or other disposition made of them."

The compensation to be paid by the United States to a railroad is an amount "not exceeding a sum equivalent as nearly as may be to its average annual operating income for the three years ended June thirtieth, nineteen hundred and seventeen," and it is only such operating income "in excess of such just compensation" as remains the property of the United States (40 Stat., 452). In determining the "average annual railway operating income" which is to be the basis of payment, judgments against the roads have, under the rules of the Interstate Commerce Commission, been deducted. (*Johnson*

vs. McAdoo, supra.) The act also puts Federal taxes on the same basis, and provides a similar deduction for them (40 Stat., 452). So far as known, it has never been contended that the Federal taxes assessed against the railroads are paid from the Government's own treasury.

As was said by the court in *Haubert vs. B. & O. R. R. Co.*, 259 Fed., 361:

"It will not be assumed that the United States will terminate Federal control and cover into the United States Treasury the residue of the revolving fund and excess income, if any, without providing for debts and liabilities incurred during Federal control."

If executive construction of the Control Act be resorted to there is ample support for this position. On July 31, 1918, the Comptroller of the Treasury said:

"Whatever the future of railroad control may be it is certain that at present the railroads are not considered an integral part of the Government system but are operated as common carriers subject to all existing laws, State and Federal, and that their status is the same as prior to the executive order with the exception of the supervisory control of the Government to secure war needs."

There is, therefore, not the same reason for a statutory application of the doctrine of election under these circumstances as exists in the case of the ordinary private employer. Possibly partly for this reason and certainly for other reasons hereinafter set forth, Congress has not seen fit to require an election to be made.

Section 10 of the Control Act which has already been quoted, enacts that—

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law.*" (Italics ours.)

Unless there was something in the Compensation Act requiring an election to be made between the right to compensation under that act and to sue for damages for injuries committed by a third party, it would seem clear that petitioner's rights remained unimpaired by the Control Act.

It should be borne in mind that the Compensation Act was approved September 7, 1916, prior to the time of the passage of the Control Act, and at a time when a postal clerk unquestionably had a right of action against a railway company by whose negligent act he was injured, *but had no redress of any kind against the United States for its negligent act.*

Bigby vs. U. S., 188 U. S., 400, 47 L. Ed., 519.

The mind at once leaps to the question whether it can be possible that Congress intended that, by the mere act of taking the railroads under Federal control as an emergency measure, a railway mail clerk should thereby be deprived of his theretofore unquestioned property right to sue and recover for injuries received through negligence such as was charged and proved in this case.

The answer to this question must be in the negative, because—

1st. *There is nothing in either the Control Act or the Compensation Act to require an election.*

2d. *If the language of Section 10 is ambiguous, the history of the legislation can be resorted to. This shows that such a result was never so intended.*

3d. *The Federal Employees' Compensation Act differs in important particulars from the legislation of those state and English and Scotch Acts cited by the court below.*

1.

1st. There is Nothing in the Control Act or Compensation Act To Require An Election.

When the Compensation Act was passed the United States could not be sued for torts committed by it. Obviously, therefore, there was no occasion to insert in the act any provision to the effect that the reception of benefits under it was a waiver of any right of action against the United States. The act did, however, carefully preserve the rights of beneficiaries thereunder to present claims and to institute suits against defendants "other than the United States," even to the extent of permitting the commission to require the beneficiary to assign to it any such claim, and conferring authority upon such commission to thereafter prosecute or compromise such claims. (Section 26, 39 Stat., p. 747.) There is no significance in the language "other than the United States." This is substantially the phrase which is almost universally used in the compensation acts of the various States, providing as they do, for the assignment to the employer of claims by the employee against third parties, so that the employer may be subrogated *pro tanto* to the extent of payments made by him. The language in these acts is usually "other than the employer." The Federal Act which followed the various State Acts, adopted substantially the same phraseology. See:

Sec. 2477m 6 Iowa Statutes.

Ill. Compensation Act, Laws 1911, p. 316, et seq.

Texas Gen. Laws, 1917, p. 285, Vernon's Anno.

Civil Code Stat. Supp., 1918, Art. 5246-47.

Black vs. Ch. & G. W. R. R. Co., 174 N. W., 774.

So. Surety Co. vs. Ry., 174 N. W., 329.

Lancaster vs. Hunter, 217 S. W., 765.

It is true that Section 7 of the Compensation Act is in the following language:

"So long as the employee is in receipt of compensation under this act, or if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which said installment payments would be continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever, except pension for service in the Army or Navy of the United States."

Plainly this does not prevent a claim being made against the United States, because it only precludes the making of such a claim "so long as the employee is in receipt of compensation under this act," or "until the expiration of the period during which such installment payments would be continued." At the end of these periods he is left free to pursue any remedy he might have, if any such exists.

Furthermore, the meaning of the word "remuneration" as used in the act is clearly limited by the words "salary" and "pay" which are used in conjunction with it. It is well settled that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Wilson vs. Sandford, 10 How., 99, 101, 13 L. Ed., 344.

U. S. vs. Bevans, 3 Wheat., 336, 389, 4 L. Ed., 404.

Alabama vs. Montague, 117 U. S., 602, 609, 611, 29 L. Ed., 1000.

36 Cyc., 1119-1120.

The clear intention here seems to be that while receiving the "compensation" provided by the act, the em-

ployee is to receive nothing in the nature of salary; he is to be cut off the payroll except as to the pay already accrued for services performed. The act is pensional in character and is in the nature of accident insurance furnished by the Government to its employees.

The Compensation Act itself bears further internal evidence of the correctness of the construction here contended for. Section 41 of the act provides (39 Stat., 750):

“ . . . That if an injury or death for which compensation is payable under this act is caused *under circumstances creating a legal liability in the Panama Railroad Company to pay damages therefor* under the laws of any State, Territory, or possession of the United States or of the District of Columbia or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company, or until he assigns to the United States any right which he may have to share in any money or other property received in satisfaction of such liability of the Panama Railroad Company.” (Italics ours.)

This language is significant. The Panama Railroad Company was the only railroad owned and controlled entirely by the Federal Government when the Compensation Act was passed, and the foregoing language of Section 41 is eloquent proof that Congress recognized the right of action on behalf of a Government employee, notwithstanding such absolute Government control and ownership. It is clear from this language that Congress had no thought that the right to compensation provided by the act was exclusive of any other remedy against the railroad company, even though the Government did absolutely own and control it.

2d. If the Language of Section 10 of the Control Act is Ambiguous the History of the Legislation Can Be Resorted To. This Shows That Such a Result Was Never Intended.

Should any doubt remain as to whether the Government intended to prohibit suits against the Director General by its own employees for torts committed by railways, that doubt is removed by a perusal of the reports of the hearings before the committees of Congress having the matter under discussion, which reports may be regarded as an exposition of the legislative intent.

Duplex Print. Press Co. *vs.* Deering et al., 254 U. S., 443.

When the Federal Control Bill was being considered by the House of Representatives Committee on Interstate and Foreign Commerce, the question now before the court was the subject of elaborate discussion, the report of which will be found in "Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-fifth Congress, Second Session, on H. R. 8172," published by the Government Printing Office. As originally drafted, the bill contained the following section then numbered 9.

"That the President is hereby authorized while carriers are under Federal control to direct that the Federal Workmen's Compensation Act of September nineteen hundred and sixteen, shall be extended so as apply to carrier employees, on such terms and conditions as will give due consideration to remedies available under State compensation laws or otherwise" (page 5).

The Federal Employees' Compensation Commission had previously held that railway employees were already by reason of the President's proclamation taking over the railroads, employees of the United States and so entitled to compensation (pp. 3, 95, 106). In this respect

they were considered to stand, therefore, in precisely the same relation to the Government as did mail clerks of whom petitioner was one.

It was then proposed to add to this section 9 the following (page 688):

"The rights and remedies so provided shall exclude all other rights and remedies of the person injured, his personal representatives, dependents, or next of kin, either at common law or by statute, whether Federal or State, against either the carrier or the United States, on account of such injury or on account of the disability or death resulting therefrom."

The present section 10 which has been already discussed was then a part of the bill and numbered 11 (page 5).

Mr. Doak, a representative of the Brotherhood of Railway Trainmen, appeared before the committee (page 687) and vigorously protested against the inclusion in the bill of the language last quoted on the ground that it would deprive employees of a very valuable right then possessed by them. As a result of his protest the *entire proposed section 9 was omitted*, the first sentence as unnecessary, and the second as taking away a valuable right of the employees, which the committee deemed it unwise to do. Notwithstanding this, the substantial provisions of section 11 were retained in the act as section 10 (see pages 574-589; 687-703). Mr. Doremus, a member of the committee, in order to show the effect of this omission asked Mr. Doak the following question, to which Mr. Doak replied in the affirmative:

"Mr. Doremus: Then with section 9 stricken out, the rights of the employees upon railroads in this country—their right of action in all our courts, both common law and statutory—will be preserved as fully as those who are seeking for injuries to private property?

"Mr. Doak: That is our position."

It is not practicable to attempt further quotations from the record of these hearings. The foregoing shows that the question of the right of railroad employees to sue for injuries received while the roads were under Federal control was thoroughly considered. And one can not doubt, after reading this record of the hearings before the House Committee, and considering the text of section 10 of the act as it finally passed, that its framers intended to make it broad enough to permit railroad employees (even though they became technically employees of the Government) as well as anyone else who suffered an injury because of the negligence in the operation of railroads under Federal control, to resort to the courts for redress, just as they could have done before the roads were placed under such control.

It is also significant that Congress, which, at the time of the passage of the Compensation Act, had clearly in mind the principle that suits might be maintained which would involve loss to the Government growing out of the Government control of railroads, a few months later, when the Control Act was passed, deliberately refrained from inserting a provision for an assignment of rights of action for liabilities for torts, except to the limited extent of reimbursing the Government only the *amounts paid under the Compensation Act, and expressly allowed the injured employee the balance.*

It has been observed that the Compensation Act contained a provision forbidding the payment of compensation under circumstances creating a legal liability against the Panama Railroad Company until the claimant should have released such right or assigned it to the Government, and that the Control Act omitted such a feature. One reason for the difference between the two laws seems perfectly plain. In the case of the Panama Railroad the United States, while not a nominal or real defendant (*Panama Railroad Co. vs. Curran, C. C. A.,*

5th Circuit, 256 Fed., 768), would be obliged to pay the amount of any judgment recovered against the railroad company because of its ownership of the entire capital stock therein. In case of judgments against the Director General of Railroads for torts committed by the roads only temporarily under his control, as has hereinabove been pointed out, it was contemplated that the judgment would be paid as part of the operating expenses of the road, and would not come out of the United States Treasury.

From the omission in the Control Act of a provision similar to the one relating to the Panama Railroad in the Compensation Act the conclusion seems unescapable that Congress deliberately chose not to subject plaintiffs to the doctrine of election.

It is clear that at the time the Federal Control Act was passed, the petitioner, a railway mail employee, had the right to sue the Illinois Central Railroad Company for any injury which might have resulted to him from its negligence. Any cause of action in his favor created a legal liability against some party "other than the United States." Section 10 of that act definitely allowed actions to be brought against carriers and "judgments rendered as now provided by law;" and enacted that "in any action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government." This section indicates that the rights theretofore existing in Federal employees to sue railroad companies were not affected by the Railroad Control Act. As was said by this honorable court in *Mo. Pac. R. Co. vs. Ault*, *supra*:

"The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of

carriers. . . . The courts were to go on entertaining suits and entering judgments under existing law but the property in the hands of the President for war purposes was not to be disturbed. *With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.*" (Italics ours.)

Unless, therefore, there is something in the general purpose of the Employees' Compensation Act, or something which by necessary implication is read into that act, to bar the petitioner's remedy by reason of his acceptance of benefits thereunder, it is submitted that the learned court below erred in its conclusions in this regard, which it briefly stated in the following language (Rec., pp. 109, 110):

"That the employee can not recover both damages and compensation is sustained by the following cases: *Barry vs. Bay State Ry. Co.*, 222 Mass., 366, 110 N. E., 1031, 1032; *Turnquist vs. Hannon*, 219 Mass., 560, 107 N. E., 443; *Cripp's Case*, 216 Mass., 586, 104 N. E., 565; *Ann. Cas.*, 1915B 828; *Pawlak vs. Hayes*, 162 Wis., 503, 156 N. W., 464; *McGravey vs. Independent Oil, etc. Co.*, 156 Wis., 580, 146 N. W., 895; *Woodcock vs. London, etc. R. Co.* (1913), 3 K. B., 139, 6 *Butterworth's Workmen's Compensation Cases*, 267; *Page vs. Burtwell* (1908), 2 K. B., 758, 1 *Butterworth's Workmen's Compensation Cases* 267; *Oliver vs. Nautilus Steam Shipping Co.* (1903), 2 K. B., 639, 5 *Minton-Senhouse's Workmen's Compensation Cases* 65; *Huckle vs. Council*, 4 *Butterworth's Workmen's Compensation Cases*, 113, (aff 3 *Butterworth's Workmen's Compensation Cases*), 536, 26 T. L. R., 580; *Mahomed vs. Maunsell*, 1 *Butterworth's Workmen's Compensation Cases*, 269; *Murry vs. North British R. C.*, 41 *Scottish Law Rep.*, 383; *Mulligan vs. Dick*, 41 *Scottish Law Rep.*, 77; *Tong vs. Great Northern R. Co.*, 4 *Minton-Senhouse's Workmen's Com-*

pensation Cases, 40, 86 L. T. Rep. N. S., 802; Workmen's Compensation Acts; Corpus Juris Treatise."

3d. The Federal Employees' Compensation Act Differs In Important Particulars From the Legislation of those state and English and Scotch Acts Above Cited by the Court.

It is submitted that none of the cases referred to sustains the proposition of the court quoted above. It is believed that the court was misled by the fact that, in some of the Workmen's Compensation Acts, including those referred to by the court in its opinion, there is an *express provision that acceptance of benefits under the act constitutes a waiver of the right to sue the employer*. With regard to the usual compensation act, it may be said that the employee has two remedies, one against the employer under the common law, in which case certain defenses are available to the employer, such as contributory negligence, negligence of fellow servant, assumption of risk, etc., and in which the plaintiff must prove negligence; and the other under the Compensation Act, in which the employer is deprived of these defenses and in which the employee recovers without proof of negligence. In the latter the compensation received by the employee is usually much less than would be received through litigation, but the result is generally much more expeditiously reached, and payment is assured. In the latter, too, the plaintiff has no right of trial by jury, while if he pursues his common law remedy, he has. It is, therefore, a feature of some of these acts that the resort to the remedy under the statute constitutes a waiver of the right to sue the employer at law, and this is in these acts expressly so stated.

In all the States, however, with the exception of Arizona and New Hampshire only, the election must be

made *before the injury*. (Bulletin U. S. Bureau of Labor Statistics, No. 275, p. 41, September, 1920.)

Petitioner contends that plaintiff can recover in this case because of the express provision of Article 10 of the Control Act, which, as it has been shown, was never intended to and did not abrogate his rights under the Compensation Act. It is not required that the United States "pay both compensation and damages for negligence to the same person for the same injury," as suggested by the learned court below (Rec., p. 109). Whatever damage he may recover against the tortfeasor inures to the benefit of the United States to the extent of any compensation paid the employee under the act, so that in no event can the United States be harmed by the mere fact that the employee has availed himself of the benefits of the Compensation Act.

An examination of the cases referred to by the court below as supporting its conclusion that an election has taken place here which has barred the plaintiff's remedy in this suit will show that in each of the States concerned there is an express *statutory* provision to the effect that the acceptance of benefits under the act is a waiver of the common law right. For instance, section 15 of the Massachusetts Act upon which the decision in *Turnquist vs. Hannon*, *supra*, was based, enacts that "the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this act, *but not against both*." 219 Mass., 560, 107 N. E., 443. (Italics ours.)

In *Shade vs. Ashgrove Lime, etc. Co.*, *supra*, also cited by the court below in support of its opinion, the court said, construing the Kansas Legislation there involved:

"While it is true that such compensation acts do not exclude other remedies in the absence of provisions to that effect, yet by the terms of the statute itself,

such remedies are excluded when both employer and employee are under its provisions." (*Italics ours.*)

92 Kans., 146, 139 Pac., 1193.

This citation, therefore, is authority for the converse of the proposition decided by the learned court below.

The question of liability of a tortfeasor for damages, after payment of compensation under compensation acts which do not provide that acceptance of benefits constitutes a waiver of the common law right, was twice before the Supreme Court of Iowa in 1919. The Iowa Act did *not*, as do many of the State statutes, require an election to be made. The cases, therefore, are authority for the proposition for which petitioner is now contending. The court said, in *Southern Surety Co. vs. Chic. St. P., M. & O. Ry. Co.*, 174 N. W., 329:

"In an action at common law, the injured party is entitled to recover all that the common law recognizes as proper to be recovered in suits of that kind. This includes compensation for the injury, loss of time, medical care, and treatment, and all other injuries which are shown to flow as a proximate result of the wrong done. The fact that the injured party proceeded against his employer, and secured compensation under the act, can not be pleaded by the wrongdoer when suit at common law is instituted against him. He is liable for the full amount of the damage, regardless of any rights the injured party has against his employer, or may have had under the act. Nowhere in the act does it say that the amount of recovery against the actual wrongdoer shall be diminished in any degree, by the fact that the injured party has received, or may receive, compensation for some of the wrong, through his employer, under the act. *The obligation of the wrongdoer is the same as if there were no Workmen's Compensation Act.* Compensation is one thing, and damages another. He recovers from the

wrongdoer all the damages that he sustained by reason of its wrongful act. He recovers only such compensation from his employer as is provided for in the statute." (Italics ours.)

When the same question came before the court a second time, in *Black vs. Chic. G. W. Ry. Co.*, 174 N. W., 774, the court drew attention to the divergence between the statutes of certain other States and its own, and reaffirmed the doctrine previously announced in *Southern Surety Co. vs. Chic. St. P. M. & O. Ry. Co.*, *supra*.

C.

MUST THE CLAIMANT REFUND TO THE GOVERNMENT THE AMOUNT RECOVERED?

Perhaps the reason why the learned court below gave such scant consideration to the doctrine of election, was *its conclusion that any recovery of damages by a party who has availed himself of the benefits of the Compensation Act inures to the benefit of the United States and the employee realizes nothing.*

Its language as it appears on pages 108 and 109 of the record is here quoted:

"It plainly appears from the statute above quoted" (the Compensation Act) "that whether the employee assigns his cause of action against a person other than the United States, to the United States, and the same is prosecuted by said commission or whether the employee prosecutes the cause of action himself, the employee gains nothing but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employees are paid or is retained by the employee and the amount thereof is credited to the United States on future payments. So that in any event the employee realizes nothing from the liability of a person other than the United States. In this

very case the plaintiff would receive nothing if he should collect his judgment other than his compensation under the Compensation Act."

It is respectfully submitted that this conclusion was neither a necessary nor logical step to the final result reached by the court. But the conclusion once reached made the whole case merely a moot one.

The language of the statute is so plain, that, with all due respect to the court below, it would seem that the statute must have been inadvertently misread by it.

The act (sections 26-27, 39 Stat., 742, 747), provides for two situations, 1st: the resort by the beneficiary to the Compensation Act prior to suit, in which case the commission may require him to assign his right of action to the United States; and 2d: the resort to the Compensation Act after recovery by suit, compromise or other wise. In the first case the amount realized by the commission as a result of the assignment and prosecution of the action shall be applied in the following manner (p. 747):

"After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employee's compensation fund, *the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.*" (Italics ours.)

In the second case it is provided that (p. 748):

"Such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any sur-

plus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund."

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

Thus the law expressly requires the United States, in the first case to *refund to the beneficiary all the recovery except the amount paid him under the Compensation Act*, and in the second case, *permits the beneficiary to retain all except the amount which has been paid or may be payable to him under the Compensation Act*.

This case seems to have been decided by the court below in accordance with what it conceived to be the analogy between the Federal Compensation Act and the usual State Compensation Laws.

It will not be denied that it was within the power of Congress to enact legislation which in express terms would have deprived a claimant receiving benefits under the compensation law, from directly or indirectly recovering from a third party, and thereafter retaining, any amount in excess of that received under the Compensation Act. It is equally within the power of the States so to do. (*N. P. Ry. Co. vs. Meese*, 239 U. S., 614, 60 L. Ed., 467.) But so far as counsel have been able to discover, such a feature is unusual in the State Compensation laws. With the exception of a very few States, it is believed that the customary legislation permits the claimant to receive and retain the benefit of any excess; and this, petitioner contends, is what the Federal Compensation Act has done. This phase of the subject will be found discussed in Bulletin of the U. S. Bureau

of Labor Statistics, No. 272, at pp. 193 et seq., published in January, 1921, wherein many instructive cases construing the various statutes are cited.

As illustrating the tendency of the courts, in case the statute is ambiguous as to the right of the injured employee to the benefit of any amount recovered from a third party in excess of the statutory amount due by his employer, the case of *Houlihan vs. Sulzberger & Sons Co.*, 118 N. E., 429, may be cited. In that case the court had under consideration the Illinois Compensation Act of 1911, which as to third persons not electing to be bound by the act, is substantially the same as the present law of that State.

That act contained among others, the following sections:

"Sec. 3. No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who has accepted the provisions of this act or to anyone wholly or partially dependent upon him or legally responsible for his estate."

"Sec. 17. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof:

"(a) The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this act shall be reduced by the amount of damages recovered.

"(b) If the employee or beneficiary has recovered compensation under this act, the employer by whom the compensation was paid or the person who has been called upon to pay the indem-

nity under sections 4 and 5 of this act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor."

The court held that in spite of the provisions of section 3 above quoted, section 17 preserved the right of the employee to recover against both the employer under the Compensation Act, and the party liable for the injury and added:

"Paragraph (b) provides that if the employee has recovered compensation, the employer may be entitled to indemnity from the person liable to pay damages and shall be subrogated to the rights of the employee to recover damages. *He is not entitled, however, to more than indemnity out of the damages recovered, and the subrogation must be limited to that amount. The amount of recovery, however, is not so limited.*" (Italics ours.)

The utterances of the learned court below upon this phase of the case at bar are the more surprising because only about three years before its decision in this case, it had before it for construction the Nebraska Compensation Act which in terms permitted an employer paying compensation, to sue a third party responsible for the injury without any limitation upon the amount recoverable in the action; and it then held that where the recovery by the employer was for a larger sum than the statutory obligation under the Compensation Law, he should turn over to the representatives of the deceased employee any excess remaining after deducting his own payment and the costs of the proceedings, such excess to go as an added benefit to the beneficiaries under the compensation law.

Otis Elevator Co. vs. Miller & Paine, 240 Fed., 376.

From the Bulletin of Labor Statistics above mentioned the following illustrations are taken:

The Ohio Statute (Acts, 1911, p. 524, amended Acts, 1913, pp. 72, 396) permits employers to act as self-insurers on a showing of financial ability, etc. No provision as to injuries by third parties appears in the law, and the Industrial Commission of the State has ruled that an employee injured by the negligence of a third party might proceed both against such party for damages and against his employer for compensation under the act. (Bulletin of U. S. Dept. of Labor Statistics, No. 272, January, 1921, page 195.)

In West Virginia, as in Ohio, the law omits all reference to injuries due to the negligence of third parties, and the Supreme Court of that State decided (*Mercer vs. Ott*, 89 S. E., 952), that the personal representative of a man killed by the fault of a third party, might recover against the latter, the right to compensation from the employer under the law being unimpaired thereby; the court stating that this decision was based "upon principles of common law."

The Kentucky statute differs from the foregoing in that it permits the injured man to sue the third party and also seek compensation from his employer; but the employer is subrogated to the employee's rights to the extent of any compensation paid by him. This is held in no way to limit the amount of the employee's recovery against the third party (*Book vs. Henderson*, 197 S. W., 449). The employer should interplead and set up his cause of action, whereupon it would be the duty of the court to apportion between the employer and the employee the damages recovered; or if the employer did not seek to recover, the third party would be entitled to have credited on his judgment any sum received by the employee in the form of compensation.

The holding by the learned court below that in no

event could petitioner benefit by any recovery is incomprehensible in view of the unambiguous language of the Federal Act. But the court having reached this viewpoint, it is not remarkable that the vital point in the case (which in the mind of the court had become purely a moot question) should have received little consideration.

The court below appears to have been impressed with the idea that if recovery were allowed in this case, the employee would recover *double compensation*, one under the Compensation Act, and one in the courts for negligence. It is believed that the error of this view has been clearly demonstrated, and that this court will be convinced, from the terms of the act itself, that petitioner must reimburse the Compensation Commission from the amount recovered in this suit for the amount paid him by it, and that petitioner would retain only the surplus.

Effect of Decision.

This decision, if unreversed, will have the effect of revolutionizing the practice in two of the Government Bureaus, viz: the Veterans' Bureau and the Federal Employees' Compensation Commission.

The uniform practice of both of these bureaus based upon the language of the respective acts applicable thereto, and the rulings of the legal officers thereof, has been to inform claimants that they have the right, not only to claim compensation under the Acts by virtue of which these bureaus respectively operate, but that they may, in addition, pursue their common law or statutory remedy against those responsible for injuring them. Many suits have been brought, and many claims not yet in suit are pending, upon which judgments for the claimants will be barred should the decision under review stand. The practice of these

bureaus has arisen by virtue of the language of the two statutes construed by the learned court below.

For convenience of reference a summary of the pertinent provisions of the Compensation Act is appended to this brief.

It is apparent from a perusal of this summary that the scope of the compensation payable by the Government under the Compensation Act, is very much more restricted than that authorized in actions for damages at common law. Under the act disability compensation can be paid (with certain minor exceptions) *only during a portion of the period of the continuance of the disability*, and even if the disability be *total*, the compensation *can not exceed 66 $\frac{2}{3}$ per cent of the employee's monthly pay* (unless the monthly pay is under \$33.33, in which case the compensation may equal the pay, and *in no event may the compensation exceed \$66.67 monthly*. Even in case of death resulting from the injury the compensation paid is only a fraction of the salary *based upon a maximum monthly salary of \$100* (sec. 10).

To illustrate the hardships of the rule of law laid down by the learned court below, we have, instead of resorting to hypothetical cases, taken from the records of the United States Employees' Compensation Commission the following actual cases:

James Robert Wheeler, employed at Camp Meade, was injured by the overturning of an automobile, necessitating *amputation of his leg above the knee*. *Compensation was paid for twenty-three days, amounting to \$51.11*, and at the end of that time he was given employment at his previous salary, which discontinued his compensation. Under the rule announced by the learned court below, even if Wheeler had been injured by the negligence of a *third party*, any judgment in his favor against the tortfeasor *would enure to the exclusive benefit of the Government*. The same injustice would result in the following cases:

William D. Hapgood, while working in the Springfield Armory, was injured to such an extent as to *lose an eye*. He was paid for nine days disability, \$16.50, and then returned to his former occupation.

Dave Parker, injured at Fort Sam Houston, *lost his hand* by amputation. His compensation amounted to \$17.78, in addition to which forty-five days' leave was granted.

Archie A. McCallum, injured at Puget-Sound Navy Yard, *lost three fingers and part of a fourth*. Total compensation of \$35.56 was paid.

Frederick A. Porter, injured at Federal Building, Bellingham, Wash., *lost his right hand*. He took thirty-two days' leave which was due him, and *the only compensation awarded was the payment of his medical bills and the cost of an artificial limb*, as he then returned to his work.

These illustrations might be multiplied indefinitely.

The beneficiaries of the War Risk Insurance Act, the provisions of which in this respect are almost identical with the Compensation Act, are likewise affected by the decision sought to be reviewed. For example:

Suppose a widow claiming the benefits of the act, has received certain monthly payments allowed her under it, and has also recovered a large judgment against a third party responsible for her husband's death. After receiving a few monthly payments she remarries, in which event her right to compensation at once ceases. Heretofore it has been the practice for the bureau, based on a decision of the comptroller (27 Compt. Dec. part 1, p. 179, Aug. 18, 1920), to relinquish to her all of the judgment in excess of the amount due her under the War Risk Act. Should the decision of the court below be followed, that practice must be reversed and the Government must retain the entire balance of the judgment. And it may be pertinently asked whether, if this decision

stands, it will not be the duty of the Veterans' Bureau to take proceedings to recover back all moneys heretofore paid to such beneficiaries, such sums amounting, as they must, to many thousands of dollars.

Should this decision be affirmed it will be the duty of the officers in charge of the Veterans' Bureau and of the United States Employees' Compensation Commission, to advise all claimants (who are as a rule in immediate need of relief) that by accepting compensation under the acts mentioned, they thereby bar themselves from exercising their common law or statutory rights even as against private persons and corporations in no way connected with the Government. It is evident that such a warning would often defeat the very purposes of these acts.

What the decision complained of means to the petitioner will be seen from the following facts:

He was performing his duties in a mail car in the middle of the night, when suddenly there was a crash, the electric lights went out and he became unconscious. When consciousness returned, he found himself suspended underneath a window of the car, partly out. He testified (Rec., p. 33):

"The first thing I noticed was an awful burning underneath my arms and something pinning me in the back and the shrieks of the men that died. It was very dark. . . . I was suffering intense pain."

He was confined to his bed in the hospital for two weeks, badly burned and suffering intense pain so as to retard sleep. He subsequently spent two weeks in another hospital, and had been under his physician's care up to the time of trial, during part of which time he had not been able to do more than two hours' light work a day. He wakes at night with a start, after dreaming of horrors and wrecks. He is obliged to continually wear tight bandages (Rec., pp. 32-37).

Of the eight men (Rec., p. 32) who were in the mail car three died from their injuries (Rec., p. 41).

Petitioner's pay at the time of the accident was \$1,600 including an allowance of \$100 for bed, etc. (Rec., p. 36). The maximum compensation which he can receive under the Compensation Act is \$66.67 monthly, or \$800 per year. (sec. 6). Even this pittance ceases the moment he is able to return to work and secures employment at a salary equivalent to the amount he was receiving prior to the accident; and, if his salary be not equal to that received prior thereto, his compensation, fixed by the act, is limited to 66 $\frac{2}{3}$ per cent of the difference.

For those elements, therefore, that enter into a jury's award in the common law action for negligence, viz: physical pain and suffering, mental anguish, compensation for permanent disfigurement, maiming or disability, and loss of earnings, the effect of the decision below is to deprive the petitioner, and other persons similarly situated, of all compensation; and any recovery by a Government employee, on account of physical and mental suffering and of the disability sustained, from any third person or corporation whose negligence was the cause thereof, would not inure at all, under the decision below, to the benefit of the sufferer, but the whole would be covered into the Treasury of the United States.

Conclusion.

For the reasons stated it is respectfully submitted that the judgment below should be reversed and the case remanded to the United States Circuit Court of Appeals for the Eighth Circuit with instructions to affirm the judgment of the District Court of the United States for the Northern District of Iowa.

WALTER C. CLEPHANE,
J. WILMER LATIMER,

Attorneys for Petitioner.

APPENDIX.

PERTINENT EXCERPTS FROM THE COMPENSATION ACT.

The Compensation Act (39 Stat., 742) contains the following provisions:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty.

"Sec. 3. That if the disability is total the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of his monthly pay, except as hereinafter provided.

"Sec. 4. That if the disability is partial the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of such partial disability. The commission may, from time to time, require a partially disabled employee to make an affidavit as to the wages which he is then receiving. In such affidavit the employee shall include a statement of the value of housing, board, lodging, and other advantages which are received from the employer as a part of his remuneration and which can be estimated in money. If the employee, when required, fails to make such affidavit, he shall not be entitled to any compensation while such failure continues, and the period of such failure shall be deducted from the period during which compensation is payable to him.

"Sec. 5. That if a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him, he shall not be entitled to any compensation.

"Sec. 6. That the monthly compensation for total disability shall not be more than \$66.67, nor less than \$33.33, unless the employee's monthly pay is less than \$33.33, in which case his monthly compensation shall be the full amount of his monthly pay. The monthly compensation for partial disability shall not be more than \$66.67.

"Sec. 7. That as long as the employee is in receipt of compensation under this act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for services in the Army or Navy of the United States.

"Sec. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

"Sec. 9. That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by the United States medical officers and hospitals, but where this is not practical shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund.

"Sec. 10. That if death results from the injury within six years the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay, subject to the modification that no compensation shall be paid where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury: . . .

"(K) In computing compensation under this section, the monthly pay shall be considered not to be more than \$100 nor less than \$50, but the total monthly compensation shall not exceed the monthly pay computed as provided in section twelve."

Section 26 relates to cases in which resort is had to the Compensation Act by the beneficiary *before* suit. It provides for the disposition of the proceeds of a subsequent suit as follows:

"After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employee's compensation fund, *the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.*" (Italics ours.)

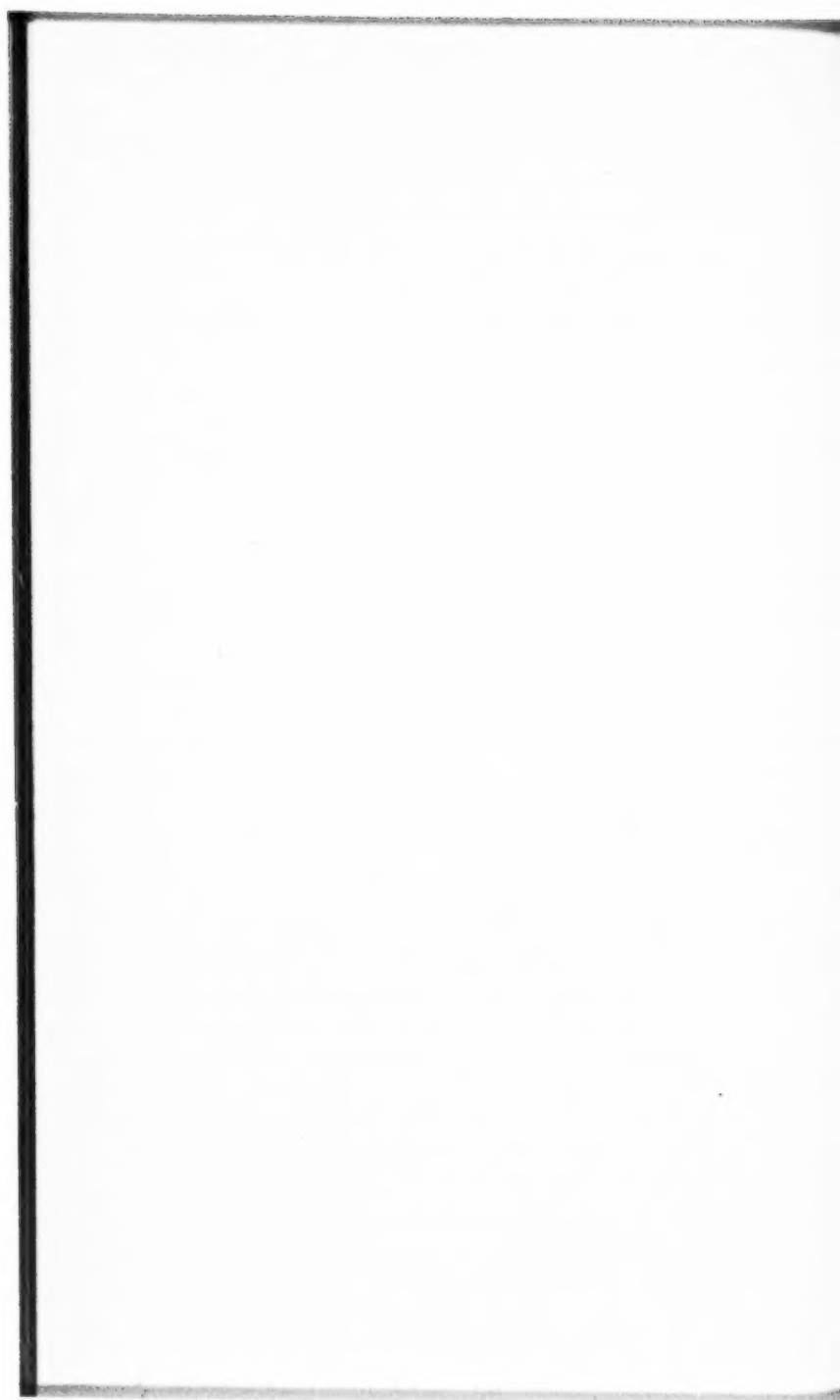
Section 27 enacts how the proceeds of a recovery in a common law action shall be applied when a *subsequent* application to the Compensation Commission is made, and enacts that:

"Such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United

States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."



Office Supreme Court, U. S.

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MAR 8 1922

WILLIAM R. STANSBURY

CLERK

No. 166.

In the Supreme Court of the United States.

OCTOBER TERM, 1921

ARTHUR J. DAHN, PETITIONER,

v.

JAMES C. DAVIS, AGENT DESIGNATED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT, APPROVED FEBRUARY 28, 1920, RESPONDENT.

BRIEF FOR RESPONDENT.

JAMES M. BROOK,
Solicitor General.

F. H. HENRELL,
ALBERT WARD,
A. A. McLAUGHLIN,
Attorneys for Respondent.



INDEX.

	Page.
Statement of facts.....	1
Argument.....	2
By accepting compensation petitioner waived right to suit at law.....	2
The suit is against the United States.....	3
The United States has not consented to pay both compensation and damages.....	13
If petitioner recovers in this case he will not be obligated to refund any part of the compensation paid.....	17
In applying for compensation petitioner elected to adopt that remedy.....	22
Section 10, Federal control act.....	31
Workmen's compensation acts are in furtherance of public policy.....	34
The Circuit Court of Appeals properly directed the District Court to dismiss the complaint.....	37

STATUTES CITED.

Federal employees' compensation act, 39 Stat., 742....	13, 14, 17, 18, 19, 20
The war-risk insurance act, 40 Stat., 609.....	21
The Federal control act, 40 Stat., 451.....	7, 31
The Transportation Act, 41 Stat., 456.....	8, 9, 13

TABLE OF CASES CITED.

<i>Bierce v. Hutchins</i> , 205 U. S. 340-6.....	24
<i>Corpus Juris</i> , 20, 38.....	25
<i>Davis, Director General v. Pullen</i> , Circuit Court of Appeals, first circuit, not yet reported.....	11
<i>Hogan v. Baja</i> , 262 Fed. 224.....	28
<i>In re Hibner Oil Co.</i> , 264 Fed. 677.....	11
<i>Kearney Milling Co. v. Railway</i> , 66 N. W. 1059, 1061-2.....	25
<i>Kraemer v. Railway Co.</i> , 181 N. W. 847-8-9.....	29
<i>Missouri Pacific Railway Co. v. Ault</i> , 256 U. S.—41 S. Ct. Rep. 593.....	4, 5
<i>Northern Pacific Railway Co. v. North Dakota</i> , 250 U. S. 133.....	4
<i>Opinion of Attorney General</i> , May 4, 1921.....	22, 39
<i>Reints v. Uhlenhopp</i> , 128 N. W. 400; 149 Iowa 284.....	24
<i>Robb v. Vos</i> , 155 U. S. 13, 41-2-3.....	23
<i>Ross v. Schooley</i> , 257 Fed. 290-1-2.....	29
<i>Shappiro v. Goldberg</i> , 192 U. S. 232, 242.....	24
<i>Standard Varnish Works v. Haylock</i> , 143 Fed. 318.....	26
<i>Tidewater Coal Exchange, Bankrupt</i> , Circuit Court of Appeals, second circuit, not yet reported.....	11, 12
<i>Thompson v. Howard</i> , 31 Mich., 309-12.....	23
<i>The Fred E. Sander</i> , 212 Fed., 545-7-8.....	26, 27
<i>T. & P. Railway v. Rigshy</i> , 241 U. S. 35-36.....	28



In the Supreme Court of the United States.

OCTOBER TERM, 1921.

ARTHUR J. DAHN, PETITIONER,

v.

JAMES C. DAVIS, AGENT DESIGNATED BY
the President under section 206 of the
transportation act, approved February
28, 1920, respondent.

No. 166.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

In addition to the statement of facts presented by petitioner, the court is advised that respondent, in addition to denying the allegations of negligence in petitioner's complaint, alleged that the accident complained of resulted from an act of God, through an extraordinary and unprecedented flood which washed out the supports of the bridge in question at such time and under such circumstances as precluded the existence of any negligence as a proximate cause of the accident.

In the Circuit Court of Appeals various errors were assigned in connection with the trial of the case,

which were not considered by the Circuit Court of Appeals on account of the conclusion reached that petitioner had elected to accept compensation under the Federal employees' compensation act and was therefore not entitled to recover in an action at law. In the concluding paragraph of the opinion of the Circuit Court of Appeals, it is stated:

We are of the opinion that upon principle and authority the plaintiff is barred from maintaining this action for negligence against the United States which makes it unnecessary to consider assignments of error relating to the trial of the case.

ARGUMENT.

I.

By accepting compensation from the United States under the Federal employees compensation act, being act of September 7, 1916 (39 Stat. 742), petitioner elected to adopt the remedy provided by the act and thereby waived all right, if any he had, to sue the United States at law to recover damages for his injuries.

Petitioner was a railway mail clerk in the regular employ of the United States, as such, and while in the performance of his duties on a train on the Illinois Central Railroad in the possession of and being operated by the United States under Federal control, was injured in a wreck, the train going through a bridge as a result of a washout. After receiving such injury he made application in accordance with the statute for compensation for such

injury under and pursuant to the provisions of the Federal employees compensation act (39 Stat. 742). Compensation was allowed and paid to him. Thereafter he commenced this suit in the United States District Court for the Northern District of Iowa, seeking to recover damages for the injury sustained, alleging negligence in the operation of the railroad. By appropriate allegations respondent questioned right of petitioner to sue the United States, through the Director General, for such injuries. The District Court overruled respondent's contentions, but on same being presented to the Circuit Court of Appeals that court held the petitioner, by making application for and accepting compensation from the United States for the injury sustained, was barred from prosecuting this suit for damages for the same injury and that the suit is in truth and in fact a suit against the United States. We contend that the Circuit Court of Appeals properly applied the law applicable to this case, and properly held the suit to be against the United States, and that petitioner having accepted compensation from the United States was barred from suing the United States at law for the same injury.

This suit is one against the United States.

At the beginning of Federal control of railroads and for some time thereafter there was considerable confusion in the minds of some people and some courts as to whether the railroads under Federal control were being operated by the railway companies or the Gov-

ernment of the United States, and as to whether suits on causes of action arising out of their operation during Federal control should be brought against the railway companies or the Director General of Railroads. Happily such confusion and uncertainty has long since been removed. In the case of *Northern Pacific Railway v. State of North Dakota*, 250 U. S. 135, this court clarified the situation in the following language:

A complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property for which it was authorized to take, the financial obligations under which it came and all the other duties and the actions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?

Again, in the case of *Missouri Pacific v. Ault*, 256 U. S. —, 41 Sup. Ct. Rep. 593, in which it was sought to hold the railway company liable for wages of an

employee of the director general in the operation of the company's system of transportation during Federal control, this court said:

If the cause of action arose while the Government was operating the system the "carrier while under Federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. * * * The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of express direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the Government liable. * * * As the Federal control act did not impose any liability upon the companies, on any cause of action arising out of the operation of their systems of transportation by the Government, the provision in Order No. 50 authorizing the substitution of the director general as defendant in suits then pending was within his power; the application of the Missouri Pacific Railway Co. that it be dismissed from this action should have been granted; and the judgment against it should, therefore, be reversed.

In that case a penalty was assessed by the lower court against the director general for failure to pay the wages involved within the time prescribed by the

Arkansas statute. This court held that while in section 10 of the Federal control act the United States had consented to be sued as to some causes of action, it had not consented to be sued for, or to be liable for, a penalty. In reversing the judgment against the Director General so far as the penalty was concerned, this court said:

By these provisions the United States submitted itself to the various laws, State and Federal, which prescribe how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agent or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it.

A decision of this court ought not to have been necessary for the purpose of determining that it was the Government of the United States that was operating the railroads during Federal control. After the

decisions of this court in the cases above mentioned it ought not to be necessary to still argue that the Government of the United States was in possession of and operated the railroads during Federal control and was the responsible party in causes of action arising out of such operation, or that a suit against the agent of the Government entrusted with the duty of operating the railroads or acting for the Government in connection with Federal control, is a suit against the United States. Counsel for petitioner, however, in their brief proceed upon the theory that the railroads during Federal control were operated by a person "other than the United States," that judgments obtained against the Director General are against a person "other than the United States," and that such judgments when paid are paid by a person "other than the United States." When the theory upon which the petitioner's brief is presented is appreciated, the entire argument falls to the ground as inapplicable. It must be remembered that section 12 of the Federal control act provides—

that moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States.

It must also be remembered that section 6 of the Federal control act appropriates \$500,000,000 "out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may

be used by the President as a revolving fund for the purpose of paying the expenses of Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, etc."

The act of Congress entitled "An act to supply a deficiency in the appropriation for carrying out the act entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 1, 1918" (Federal control act) approved June 30, 1919, appropriated \$750,000,000 in addition to be used for such purposes.

In section 202 of the transportation act of 1920 Congress reappropriated all unexpended balances in the said appropriations aforesaid, and all revenues remaining from the operation of the railroads under Federal control, all that thereafter might be received therefrom and in addition \$200,000,000 to be used by the President to "adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature growing out of or incident to Federal control."

In section 210 of the transportation act of 1920, paragraph (e), Congress appropriated "out of any moneys in the Treasury not otherwise appropriated the sum of \$300,000,000, which shall be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying judgments, decrees, and awards referred to in subdivision (e) of section 206."

The judgments referred to in paragraph (e) of section 206 of the transportation act to be paid out of the appropriation of \$300,000,000 made in said section 210 are judgments entered in

actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier, etc.

It is thus seen that the Government not only took possession of and operated the railroads, but that it assumed the responsibility for such operation and made appropriations to pay the expense thereof, liabilities accruing therefrom, and compensation to the owners, amounting to more than a billion and a half dollars. Counsel for petitioner, however, argue, in effect, that a suit against the Government's agent upon a cause of action growing out of the performance of his duty in operating the railroads for the Government, is not a suit against the United States, and that although the United States has compensated him in accordance with its laws applicable thereto, the petitioner is still entitled to sue the United States for damages for the same injury and to recover a second compensation therefor. Petitioner contends that the money paid by the United States to him as compensation is not the same kind of money, or is derived in a different way from the money he seeks to have paid him as damages from the United States, and as a second and double compensation for the

same injury. The money appropriated to pay compensation does not, we think, have different earmarks from money appropriated out of the Treasury to pay damages incurred by claimants for injuries received on account of negligent operation of railroads under Federal control. The money the United States receives from income taxes, other internal revenue, or import duties, is not different, we think, from money received by the United States as revenues from the operation of the railroads under Federal control. The money is money of the United States in each instance. It has no earmarks, and if it were true that the revenues derived from the operation of the railroads were sufficient to pay all claims arising in connection therewith, such fact would furnish no reason, we think, for contending that while petitioner could not recover a second compensation, if the money to be paid must come from the same source in the Treasury as the money paid him as compensation, he can recover a second compensation if the money therefor comes from revenues derived from the operation of the railroads. The contention is, we think, absurd. It is notorious, however, that the revenues derived by the Government from the operation of the railroads fell far short of being sufficient to meet the obligations of the Government growing out of such operation. The transportation act was passed at the end of Federal control and contained appropriations amounting to \$500,000,000, most of said amount being for the purpose of paying obligations which could not be paid out of revenues derived from

the operation of the railroads. The situation thus presented is that petitioner has received from the United States compensation for his injuries and he now contends that he is entitled to have the United States pay in addition thereto damages without reference to, and wholly apart from, the compensation he has already received. It seems clear that such a result was not intended by Congress and can not be accomplished.

The courts have uniformly held that a debt accruing out of the operation of railroads under Federal control, such as freight charges and the like, is a debt due the United States and that the United States is entitled to priority for such debt under section 3466, Revised Statutes. Such was the holding of the Circuit Court of Appeals for the Seventh Circuit in *In Re Hibner Oil Company*, 264 Fed. 677; also by the Circuit Court of Appeals of the First Circuit in *James C. Davis, Director General v. William L. Pullen, Receiver, et al*, decided January 6, 1922, not yet reported; also by the Circuit Court of Appeals of the Second Circuit in *In the matter of Tidewater Coal Exchange, Bankrupt*, opinion announced in February, 1922, not yet reported. The latter case involved the right of the Director General to vote at a creditors' meeting upon the selection of a trustee. The debt involved arose out of the operation of the railroads under Federal control and was based upon freight and demurrage charges. The other creditors resisted the right of the Director General to vote at the creditors' meeting on the ground that the debt was

due the United States, and under section 3466, Revised Statutes, entitled to priority, and that under section 56 (b) of the bankruptcy act, which provides—

Creditors filing claims which are secured or have priority, shall not, in respect to such claims be entitled to vote at creditors' meetings,

the Director General was deprived of the right to vote on the question of selecting the trustee. In holding that the Director General did not have the right to vote at such meeting of creditors because the debt was one owing the United States, for which priority was provided by the statute referred to, the Circuit Court of Appeals of the Second Circuit said:

The United States in operating the railroads during the period of Federal control was engaged in the performance of a governmental function and was not carrying on a merely private commercial enterprise. See *In Re Western Implement Company*, 166 Fed. 576. The director general in claiming on behalf of the United States the moneys arising out of the operation of the railroads is seeking to recover public money and he is acting in a governmental capacity as much as though the money to be recovered were taxes. See *Chesapeake & Delaware Canal Company v. U. S.*, 250 U. S. 123, 126, 127.

The foregoing language indicates that the Circuit Court of Appeals of the Second Circuit does not share with counsel for petitioner the view that public money is earmarked and that public money arising out of

~~the claim of the injured party against the Panama~~
the operation of the railroads is different from public money raised by taxation. Petitioner's rights do not depend upon whether a judgment in his behalf could be paid out of revenues derived from the operation of the railroads or must be paid out of money in the Treasury derived from taxation. If his rights should depend upon such difference in the source of the money of the United States, we think the court must take judicial notice of the fact that the revenues derived from the operation of the railroads have fallen short of the amount necessary to pay the liabilities incurred by the Government in connection with such operation by more than a billion and a half dollars, and the payment of the judgment, if any is obtained in this case, must be out of the appropriation of \$300,000,000 provided for in section 210 of the transportation act. It must be remembered that in paragraph (e) of section 206 of the transportation act, the Director General is expressly required to pay judgments out of such appropriation. The suit is therefore a suit against the United States, and the judgment, if any is recovered, must be paid by the United States out of any moneys in the Treasury subject to the appropriation in section 210 of the transportation act.

The United States has not consented to pay both compensation and damages for the same injury.

The Federal compensation act in its present form was enacted in 1916. It applies to the class of employees of which petitioner was a member, and

provides "that the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty," etc. Detailed provisions are contained in the act in respect to the methods of applying for and awarding compensation, the amounts to be paid and conditions under which payments will be continued.

At the time of its enactment the Government owned all of the stock in the Panama Railroad. In section 41 of the act it was provided that if an injury or death, for which compensation is payable under the act, is caused under circumstances creating a legal liability in the Panama Railroad Co. to pay damages therefor, etc., no compensation should be payable until the person entitled thereto should release the Panama Railroad Co. from liability on account of the injury or death, or until he should assign to the United States his rights against the Panama Railroad Co. This language we think clearly expressed the intention of Congress that an injured Federal employee should not be twice compensated for an injury at Government expense. Being the owner of all the stock of the Panama Railroad, the establishing of a liability against the Panama Railroad was of interest to the United States and to its disadvantage. In order, therefore, that the resources of the United States should not directly or indirectly be used to make a double compensation to the employee, Congress provided that no compensation should be paid until the claim of the injured party against the Panama

Railroad should be released or assigned to the United States.

We are of the opinion that the language of the compensation act, which provides that compensation *shall* be paid, etc., clearly indicates that Congress intended that the compensation act should furnish an exclusive remedy to an employee so far as any rights against the United States are concerned. Congress certainly intended that if an employee in the mail service should be injured by the operation of a mail wagon, or on a Government transport, or a vessel under the jurisdiction of the Navy, or in connection with the operations of the Army, the sole remedy of such employees should be under the compensation act. The circumstance that the Government acquired possession, control, and operation of the railroads, and thereby undertook the transportation of its own railway mail employees, ought not to justify the conclusion that as to such employees Congress intended to furnish a remedy for any injury other than under the compensation act. Certainly it must be concluded that Congress did not intend that an employee who took advantage of the provisions of the compensation act, and received compensation for his injury, should also be permitted to sue the United States through the Railroad Administration to recover a second time for the same injury. While we believe the compensation act furnishes an exclusive remedy to a railroad mail employee injured in the service, if it be conceded that he had the right to choose between the remedy furnished by the

compensation act and an action at law for damages, he did not have the right to both remedies, and having elected to pursue the one he is precluded from pursuing the other. That he was not entitled to enjoy both remedies we think must be clear.

Counsel for petitioner have discussed at great length decisions of the courts under the compensation acts of the various States which permitted the injured party, who has received compensation from his employer, to proceed against a third party, whose negligence caused the injury. Many State statutes of the character referred to provide for subrogation of the employer to the rights of the employee as against the negligent party to the extent of the payments made by the employer in some cases and in others to the full extent of the cause of action. Such statutes and the construction placed thereon by the courts do not aid petitioner in his contention. There is certainly a wide distinction between permitting one who has received compensation from his employer to recover damages from a negligent third person who caused his injury, there being no statute forbidding, and permitting an employee to receive compensation from his employer for his injury, and also sue his employer for damages on the theory of negligence, and thus recover a second time. It is the latter situation that is presented here. We do not question the right of an employee who has been compensated by his employer to recover full and complete damages from a negligent third person who caused his injury if the statutes of the State permit, but we do question

the right of an employee of the United States to recover compensation under the Federal compensation act, and having done so, and having retained such compensation, sue the United States through any of its agencies for damages for the same injury. While counsel have referred at length to the workmen's compensation acts of various States, they have not cited any State statute, or the decision of any court, which permitted the employee to recover both compensation and damages from his employer. We have been at some pains to examine the various State statutes and the decisions of the courts, and have been unable to find that any statute or any court has authorized such double compensation. We think it needs no argument to satisfy this court that a statute authorizing the payment of both compensation and damages to the employee for the same injury would be in violation of the Constitution of the United States, as a taking of employer's property without just compensation, and without due process of law.

If petitioner can recover in this case he will not be obliged to refund to the United States any part of the compensation already paid him, for such requirement applies only to a recovery against a negligent third party "other than the United States."

Section 26 of the Federal employees' compensation act provides:

If an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability upon some person *other than the United States* to pay

damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this act. (The italics are ours.)

Section 27 of the act provides:

That if an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability in some person *other than the United States* to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the *costs of suit* and a reasonable *attorney's fee*, apply the money or other property so received in the following manner: (a) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same

injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund. (b) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of same injury. (The italics are ours.)

It is thus seen Congress intended the United States to have the benefit, at least to the extent of payments made or to be made under the compensation act, of any liability of a person "other than the United States" to pay damages on account of the injury. The injured party could be required to assign the entire claim to the United States as a condition for receiving compensation. While it may be that if the recovery from the negligent third party, after paying attorney's fees and other expenses of litigation, should be in excess of the compensation authorized, the injured party would profit out of such recovery, such result would not always follow. In many cases there would be no recovery at all against the third party; in others, the expenses of litigation, including the attorney's fees, especially if on a contingent basis, would be such as to preclude the net amount of recovery exceeding the compensation. Whether the injured party would profit in any case on account of claim against the negligent third party would be problematical and speculative. The thought we wish most to impress on the court in this connection is that Congress made

provision for refunding, to the extent that it made payments under the compensation act, if the injured party recovered so much from the negligent party. Congress did not intend the injured party to have the benefit of such recovery except, possibly, to the extent such recovery exceeded the compensation paid, or to be paid, under the act.

In the case at bar, if the petitioner is permitted to recover in this suit, the recovery will not be against a person "other than the United States." On the contrary, the recovery will be against the United States. No representative of the Government has a right to require petitioner to refund to the United States any part of the recovery, if any, which the courts permit him to have in this action, since it is only out of recoveries against persons "other than the United States" that the law authorizes its representatives to require the petitioner to make refund of the compensation paid. If, therefore, petitioner is entitled to recover damages in this action against the United States, he is entitled to retain the full amount recovered, and thus have a complete double recovery or compensation for his single injury, and that from the United States. No other class of employers is subjected to such responsibility. Employees of no other employers are given such consideration. In view of the provisions of section 7 of the Federal compensation act, which reads:

That as long as the employee is in receipt of compensation under this act, or, if he has been

paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States,

we think a definite intent of Congress is shown contrary to petitioner's contention, and which precludes the idea of petitioner having a remedy for damages after having received compensation.

The provisions of the war risk act in respect to injuries occasioned by negligence of third persons, and in respect of subrogation of the United States to the rights of the injured parties against such third persons, are substantially identical with the provisions quoted from the Federal employees' compensation act. On May 4, 1921, the Attorney General rendered an opinion to the Secretary of the Treasury with regard to the duty of the Bureau of War Risk Insurance in respect to requiring an injured soldier or sailor making application for compensation to proceed against the Director General of Railroads for damages in cases where the soldier or sailor was injured because of negligence in the operation of the railroads under Federal control. The war risk insurance act permitted the Bureau of War Risk Insurance to require the injured soldier or sailor to proceed against any party "other than the United States," against whom a legal liability existed on ac-

count of injury. The Attorney General in such opinion held:

I conclude from the above that the liability incurred by a railroad under Government control for an injury or death is a liability of the United States and not a liability of "some person other than the United States" within the language of section 313 of the war risk insurance act, and your first question is, therefore, answered in the negative.

A full and complete copy of the opinion of the Attorney General is contained in appendix attached hereto. We conclude this suit is not against "a person other than the United States," and, therefore, any recovery in favor of petitioner may be disposed of as he sees fit without obligation to refund any amount paid to him as compensation under the Federal employees' compensation act. If he is permitted to recover, then he recovers a second time for the same injury, which is clearly contrary to the intention of Congress, and would be an anomaly unprecedented in the law.

Petitioner in applying for and receiving compensation elected to adopt that remedy.

The doctrine is well established that where two different and inconsistent remedies are open to a party, and with full knowledge he adopts one of them, he is barred from thereafter pursuing the other. If therefore it be conceded that petitioner had the choice of recovering compensation or suing for damages, by

making application for compensation he irrevocably elected to pursue that remedy, and may not now successfully prosecute a suit for damages. This doctrine is discussed in *Robb v. Vos*, 155 U. S. 13, 41-43. Quoting from *Thompson v. Howard*, 31 Mich. 309, 312, which was a case where a father had brought an action for a minor son's wages and after the disagreement of the jury discontinued the suit and brought an action for the unlawful enticing away and harboring of the son, the court said:

A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. The plaintiff's proceeding necessarily implied that the defendant had the young man's services during the time with plaintiff's assent, and this was absolutely repugnant to the foundation of this suit, which is, that the young man was drawn away and into defendant's service against the plaintiff's assent.

The *Vos* case involved the right to disaffirm a contract made by his agent without authority or to affirm the contract. The plaintiff brought a suit on the contract and afterwards undertook to repudiate

the contract. In holding that the first election was final, the court said:

The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act.

The same thought is expressed in *Bierce v. Hutchins*, 205 U. S. 340, 346. In the case of *Shappirio v. Goldberg*, 192 U. S. 232, 242, this court said:

It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract.

The same thought is presented in *Reints, etc., v. Uhlenhopp*, 128, N. W. 400, 403; 149 Iowa 284, which involved an election made by bringing suit on a renewal note with sureties, the signature of one surety being forged. Plaintiff knew of such forgery at the time of bringing suit against the surety who actually signed. Subsequently it brought suit on the original note. The court held that it was bound by the election evidenced by bringing suit on the renewal note with knowledge that the signature of one surety was forged. The court there said:

Plaintiff's conduct with reference to the second, the \$11,000 note, was such as to justify a jury in finding that it had elected to pursue whatever remedy it might have thereon against the surety who actually signed the same, thus of necessity abandoning its claim on the first \$10,000. * * * Plaintiff could not enforce both notes, and, if after knowledge of all the facts it concluded to rely upon the one for \$11,000, it is bound by its election.

Petitioner could not recover both compensation and damages, and the same reason exists for saying that in applying for compensation and receiving same he elected conclusively to pursue that remedy and can not now sue for damages. In fact, we think the mere making of application for compensation constitutes an irrevocable election to pursue that remedy. He has gone further, however, and has actually received compensation. Another Iowa case involving the same principle is *Kearney Milling Co. v. Union Pacific Railway et al.*, 66 N. W. 1059, 1061-1062. A very full discussion of the doctrine is contained in the court's opinion, with illustrations of the application thereof. The rule is also stated in 20 Corpus Juris 38, as follows:

An election once made between coexisting remedial rights which are inconsistent is not only irrevocable and can not be withdrawn without due consent, even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an

absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election.

The statement of the author is abundantly sustained by authorities cited.

The doctrine was applied in *Standard Varnish Works v. Haydock*, 143 Fed. 318, C. C. A., Sixth Circuit, where a bankrupt obtained goods by fraudulent representation. They were not paid for. The seller had the right to confirm the sale and assume the position of a creditor for the price or repudiate the sale and recover the goods. He filed his claim for the price in the bankruptcy proceedings and voted as a creditor in selecting a trustee. It was held that he could not thereafter withdraw his claim and recover the goods. Unless petitioner is entitled to recover both compensation and damages, the adopting of the one course is inconsistent with the other, and under the universal rule announced he is bound by his choice and can not now recover damages.

In the case of *The Fred E. Sander*, 212 Fed. 545, 547-548, District Court, Western District of Washington, was involved the right of a workman who had received compensation under the workmen's compensation act of Washington, and who thereafter sued to recover damages by a proceeding in admiralty under Federal statutes. The facts were such as to give him a right to claim compensation under the Washington statute, and he contended that he was also entitled to recover damages in admiralty, under the Federal statute, from his employer. The Wash-

ington statute involves payment into a fund administered by the State by employers subject to the act. The compensation to the injured employee is made by State officials from this fund. The Washington act provides that the remedy is exclusive, and that "all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished except as in this act provided."

The injured party claimed that the exclusive remedy was only with respect to rights and causes of action enforceable in the State courts and that his right given by the Federal law to proceed in admiralty for damages against his employer was not affected by the State statute and that such right was still open to him, notwithstanding he had received compensation. The court held that while the exclusive provision of the State statute was with respect to remedies in State courts, still he was entitled to but one compensation for one injury and that having elected to take such compensation under the State law, he was precluded from recovering under the Federal law. In so holding the court said:

But for the enactment of the workmen's compensation act of the State of Washington, libelant would have two remedies—one his common-law action for damages against the owners and the other a proceeding in admiralty. The selection of the one remedy would bar a proceeding in the other. A party can not enforce both remedies and will be

required to elect whether to pursue his common-law remedy or proceed in admiralty. The workmen's compensation act, while it took away the common-law action, provided in its stead another remedy. If the libelant determined to obtain relief from the substitute which is provided for his common-law remedy, and received compensation under such act, then he can not proceed in admiralty and thus obtain double compensation for the injury of which he complains. An injured workman who has made claim for and received compensation under the workmen's compensation act has elected to accept under the act, and can not therefore raise an action in admiralty.

The same doctrine is announced in different language in *Hogan et ux. v. Buja*, 262 Fed. 224, District Court, Eastern District of Louisiana. The court said:

The person injured, in a case of tort cognizable in admiralty may elect whether to proceed in admiralty, at common law, or under the provisions of the workmen's compensation law, where it exists. If a settlement has been made in this case in such a manner as to exclude any further recovery, that fact may be set up in defense, as courts of admiralty administer the broadest equity, and would not permit two recoveries for the same tort.

In *Texas, etc., Ry. v. Rigsby*, 241 U. S. 33, 36 Supt. Ct. Rept. 482, 60 L. Ed., 874, it was held that a cause of action is created by the Federal safety appliance act of itself, regardless of whether the em-

ployee is engaged in interstate commerce. In *Ross v. Schooley*, 257 Fed. 290-292, the Circuit Court of Appeals of the Seventh Circuit held that where an employee of an interstate carrier was injured while engaged in intrastate commerce, by reason of a defective safety appliance, he was entitled to recover under the safety appliance act, notwithstanding the existence of a State workmen's compensation act applicable to employees of the carrier involved while engaged in intrastate commerce. The same doctrine was announced by the Supreme Court of Minnesota in *Kraemer v. Chicago & North Western Railway Co.*, 181 N. W. 847-849. In such cases the employee could doubtless elect whether he would proceed for compensation under the State law or seek a recovery under the safety appliance act. We think no court would have any hesitation in saying that he could not recover under both laws, and that resorting to one remedy would constitute an irrevocable election to pursue that remedy and would preclude his changing his mind or making a new election to adopt the other remedy. If, however, petitioner can do so in this case we see no reason why an employee of a railway company under the circumstances suggested can not do the same thing. If petitioner is entitled to both compensation and damages, then an employee of a railway company under the circumstances disclosed, is entitled to recover from his employer both compensation and damages, the one under the State law, the other under the Federal law. It would, we

think, be a great injustice to the employer, whether a railway company or the United States, to permit the employee, after receiving the injury, to apply for and receive compensation, which is provided independent of the question of negligence, and having benefited by such remedy permit him to bring a suit at law and experiment in the courts at the expense of the employer in attempting to prove a liability based on negligence, and if he succeeds in the proceeding refund to the employer the amount received as compensation, if a sufficient amount remains to him after he has paid expenses of the litigation, including compensation to his attorney, measured by the usual percentage involved in a contingent fee. The employer ought not to be put to the responsibility of paying compensation and then also be subjected to onerous litigation at great expense while the employee experiments in an effort to establish negligence, even if a recovery in such action by the employee involves a duty and obligation on his part to refund the compensation he has already received. It is by no means certain that after paying the attorneys' fees and other expenses of litigation, there will be sufficient left to an employee, who succeeds in establishing negligence of the employer, to fully recompense the employer for the compensation already paid. In such a case the employee would not be benefited and the employer would be very greatly disadvantaged. The employer is thus put to the expense not only of defending himself in

the damage suit, but of also paying for attorneys' fees and expense of litigation incurred in behalf of the plaintiff. The law does not contemplate such a result. In the case at bar, however, there would not even be an obligation on the part of the petitioner to refund any part of the compensation that has been paid him, even if permitted to recover damages in this action, because he is only obligated to refund when the recovery is against a person "other than the United States." He would, therefore, if permitted to recover, as has already been argued in another division of this brief, have the right to retain the entire recovery, and thus enjoy a double compensation for his injury and subject the Government to a double payment.

Consideration to be given section 10 of the Federal control act.

Counsel for petitioner have called attention to some of the matters considered by the committees of Congress in connection with enactment of the Federal control act, including the suggestion that railway employees be confined to the remedy provided by the Federal employees' compensation act for injuries they might receive while in the employ of the Government in operating the railroads. They call attention to the fact that a representative of the Brotherhood of Railway Trainmen appeared before the committee and protested against the making of such provision, and insisted that railway employees ought to be permitted to retain the remedy for damages for injuries as though the railroads were

under private operation. The proposal to confine such employees to the remedy furnished by the compensation act was abandoned, and railway employees were permitted to recover damages for injuries resulting from negligence in the operation of the railroads. Counsel concede the provisions of the compensation act were broad enough to include railway employees, and that the Federal Employees' Compensation Commission had previously so held. The result of legislation as finally enacted probably permitted a railway employee to elect as to whether he would claim compensation for an injury or claim damages. Certainly the legislation did not have the effect of giving him the right to both remedies and a double compensation. While such is doubtless the conclusion to be drawn from the act of Congress, we are unable to see anything in the provisions of the act, or in the discussions before the committees of Congress, or before Congress, justifying the conclusion that railway mail clerks injured in the performance of their duties upon a Government operated train should be entitled to recover compensation, and thereafter sue the Government for damages. We are unable to discover anything in the matters referred to which justify the conclusion that because Congress desired railway employees to continue to have the remedies theretofore existing, a railway mail clerk entitled to the benefits of the Federal workmen's compensation act, should also be permitted to sue the Government for damages when injured while

performing his duties on a Government operated train. Certainly, we see nothing indicating that section 10 of the Federal control act was intended to give such railway mail clerk an additional remedy and additional compensation, or that would justify treating a suit against the Government operating the railroads as being against a person "other than the United States."

Counsel, however, say that the provision in section 10, which reads "and in any action at law, or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," precludes the Government from saying that this is a suit against the United States, and from denying that petitioner is entitled to recover damages in addition to compensation. The contention we make is not contrary to such language in section 10 of the Federal control act. If the Director General had made a settlement with an employee having the right to claim damages, he could plead such fact as a defense to the employee's suit. The making application for compensation, the allowance thereof, and payment of same, is just as effective to defeat the employee's right as if he had made a settlement of a claim which he had a right to settle. When the Government pleads such application and allowance of compensation, it is not basing a defense upon the fact that the Railroad Administration is an agency or instrumentality of the Federal Government, but it is making a defense

which any employer could make under like circumstances. The defense the Government is making in this case is not based upon the fact that it is the Government, except in so far as the fact of its being the Government identifies the defendant in this suit with the employer who paid compensation, and emphasizes the thought that petitioner, after receiving compensation from his employer, is now suing his employer for damages for the same injuries.

Workmen's compensation statutes are in furtherance of a public policy which seeks to avoid waste of litigation, uncertainty as to remedy and preserve to injured employees a maximum amount of charge upon industry on account of industrial accidents.

Counsel have called attention to allowances made Government employees under the Federal employees' compensation act, where the amounts paid appear to be small as compared with the injury alleged to have been suffered. Whether attention is called thereto for the purpose of discrediting the Federal workmen's compensation act, or the administration of it is not clear. The terms of the act authorizing in proper cases the payments of sixty-six and sixty-seven hundredths dollars monthly, or \$800 a year, are the best evidences of its character. We assume there have been many cases where the maximum allowance has been made, and many cases where allowances less than the maximum have been provided for. Compensation is based not on negligence of the Government, but upon the fact of injury to the employee in the performance of his duty. In many cases it must be a gratuity. The fact that the employee

named by counsel was carried on the pay roll, receiving regular wages or salary, of course explains the small allowances. It must be remembered that Congress provided that an employee should receive no other allowance from the Government, except wages or salary for services actually performed while receiving compensation, and save and except only pensions for service in the Army or Navy. Compensation is usually fixed at something less than the wages or salary being paid, and of course an employee will prefer to receive his salary during the time he is convalescing, to receiving the compensation provided for in less amount. The purpose of compensation generally is to insure to the injured party as great a portion as possible of the amount charged against industry and production, also a fair distribution among all injured employees. It became a matter of public concern that an employee seriously injured should recover nothing therefor because of contributory negligence, assumption of risk, or failure to prove negligence on the part of the employer, while other employees received large judgments, of which probably 50 per cent was claimed by the attorneys who prosecuted their suits. All such amounts were charged against the industry. The portion going to expenses of litigation and the attorneys was waste. To obviate such result and secure the injured employees uniform and equal justice and consideration, workmen's compensation acts were enacted, holding the employer liable independent of any question of

negligence, contributory negligence, or assumption of risk.

Workmen's compensation laws are among the most wholesome enactments of modern legislation, and should not be discredited by the illustrations counsel suggests. The payments made in the cases cited do not justify the conclusion that petitioner is entitled to recover damages in addition to the compensation provided by Congress. After all, it is the intent of Congress which is to be ascertained. Doubtless, Congress could give both remedies for the same injury so far as the Government is concerned. It could make the compensation law more liberal, and doubtless more acceptable to counsel for petitioner. Congress, however, has expressed the measure of responsibility the Government will assume. The amount that shall be paid in compensation is solely within the power of Congress to determine. It is for the court to ascertain and enforce the intention of Congress. In view of the provisions of the act, which are responsible for the small amounts paid the parties referred to by counsel, it is unthinkable that Congress intended petitioner to have the full benefits of its generosity as evidenced by the compensation act, and also that he should be permitted to recover damages for his injury, the amount thereof to be measured by the generosity of a jury of his peers.

II.

The Circuit Court of Appeals in remanding the case to the District Court properly directed that the complaint be dismissed.

The conclusion of the Circuit Court of Appeals that petitioner, by accepting compensation, had elected to pursue that remedy, and was, therefore, barred from suing at law, required a dismissal of the complaint. The court might have remanded the case for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals, but the only action the District Court could have taken in compliance with such instruction would be to dismiss the complaint, because any other action would be inconsistent with the conclusion of the Circuit Court of Appeals that he was barred from suing at law. It was, therefore, proper for the Circuit Court of Appeals to remand the case with the instruction that the complaint be dismissed. The case relied upon by the petitioner involved a question of fact which the jury had a right to pass upon, and the Appellate Court could not, of course, deprive the plaintiff of that right. In this case, the determination of the rights of the parties involve a question of law only, so that the Circuit Court of Appeals was entirely within its rights in so remanding the case. The order remanding does not, therefore, deprive the petitioner of any rights under the 7th Amendment to the Constitution.

In conclusion, we respectfully reassert that petitioner elected to receive compensation for his injury. Compensation has been allowed and paid to him. He is, therefore, barred from prosecuting this suit, and the conclusion reached by the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

JAMES M. BECK,

Solicitor General.

F. H. HELSELL,

ALBERT WARD,

A. A. McLAUGHLIN,

Attorneys for Respondent.

APPENDIX.

DEPARTMENT OF JUSTICE,

Washington, May 4, 1921.

DEAR MR. SECRETARY: This will acknowledge receipt of your letter of February 9, 1921, requesting my opinion upon the following propositions:

1. Has the Bureau of War Risk Insurance the right, or is it the duty of the Director of the Bureau of War Risk Insurance, in making an award to a person entitled to compensation under the provisions of the war risk insurance act who has been injured on a Federal controlled and operated railroad, to require as a condition of the award of compensation such person to prosecute his cause of action, if any, in his own name against the Director General of Railroads, United States Railroad Administration, or the corporation upon whose line the injury occurred, or to require such person to assign to the United States any right of action such person may have, if any, so as to enforce a claim for liability against the Director General of Railroads or the railroad corporation?

2. Is a person injured under conditions described in the first question, or his widow or other person to whom the cause of action accrued in the event of his death, barred from maintaining a suit brought against a railroad corporation or the Director General of Railroads, either or both, if the injured person or such other person has applied for and received compensation under the terms of the war risk insurance act?

Section 313 of the war risk insurance act as amended provides:

(1) That if an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made.

If a beneficiary or conditional beneficiary shall have recovered, as a result of a suit brought by him or on his behalf, or as a result

of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such money or other property so recovered shall be credited upon any compensation payable, or which may become payable, to such beneficiary, or conditional beneficiary by the United States on account of the same injury or death.

(2) If an injury or death for which compensation may be payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, then, in order to preserve the right of action, the director may require the conditional beneficiary at any time after the injury or death to assign such right of action to the United States; or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid to such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury or death.

(3) The bureau shall make all necessary regulations for carrying out the purposes of this section. For the purposes of computation only under this section the total amount of compensation due any beneficiary shall be deemed to be equivalent to a lump sum equal

to the present value of all future payments of compensation computed as of the date of the award of compensation at four per centum, true discount, compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality.

A conditional beneficiary is any person who may become entitled to compensation under this article on or after the death of the injured person.

Nothing in this section shall be construed to impose any administrative duties upon the War or Navy Departments.

From the language of this section it appears that it is applicable only to those cases in which the injury or death for which compensation is payable is caused under circumstances creating a legal liability upon some person other than the United States or the enemy. It therefore becomes necessary to determine whether such legal liability incurred by a railroad under Government control is a liability of the United States or of some other person.

By virtue of the power granted him by the act of August 29, the President, by proclamation issued December 26, 1917, took possession and assumed control of the railroad systems of the United States, and this possession and control the United States Supreme Court has held was complete and replaced entirely the previous possession and control of the private ownership theretofore existing. (*Northern Pacific Railway Company v. North Dakota*, 250 U. S. 135.)

This proclamation provided that possession, control, operation, and utilization of such transportation

systems should be exercised through the Director General of Railroads, and that "suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine."

On March 21, 1918, Congress enacted the Federal Control Act, by virtue of which all the earnings of the railroads were expressly made the property of the United States; and on October 28, 1918, the director general, in the administration of Federal control, issued his General Order No. 50, in which he recited that suits were being brought against the carrier corporations on matters based on causes of action arising under Federal control for which the said carrier corporations were not responsible, and directed that actions, including claims for death or injury to persons arising after December 31, 1917, and growing out of the possession, use, control, or operation of the railroads by the director general, and which but for Federal control might have been brought against the carrier company, should be brought against the director general.

It has been held in many jurisdictions that such actions as above, instituted against the Director General of Railroads, are in effect suits against the United States, and that the carrier companies are not liable. See—

Pullman Co. v. Sweeney, 269 Fed. 764.

Bryson v. Hines, 268 Fed. 290, 295.

Mardis v. Hines, 267 Fed. 171.

Erie Railway Co. v. Caldwell, 264 Fed. 947.

Blevins v. Hines, 264 Fed. 1005.

Westbrook v. Director General of Railroads, 263 Fed. 211.

Smith v. Babcock & Wilcox Co., 260 Fed. 679.
Nash v. Southern Pacific Co., 260 Fed. 280, 284.
Haubert v. Baltimore & Ohio Ry. Co., 259
 Fed. 361.

Rutherford v. Union Pacific Co., 254 Fed. 880.

The transportation act of 1920 provides that actions which accrued during Federal control and which were previously directed to be brought against the director general, are, after the termination of such control, to be brought against an agent designated by the President for that purpose, and judgments, decrees, and awards in such actions are made payable out of a revolving fund created by section 210 of the act and appropriate from the Treasury of the United States.

I conclude from the above that the liability incurred by a railroad under Government control for an injury or death is a liability of the United States and not a liability of "some person other than the United States," within the language of section 313 of the War Risk Insurance Act, and your first question is therefore answered in the negative.

Your second question does not appear to me to present a proper matter for an opinion by the Attorney General, since it is not one arising in the administration of your department, but rather one for the benefit of claimants; it has always been the policy of the Attorney General to render opinions to the heads of executive departments only when such questions relate to matters calling for action or decision on their part.

20 Opinions of Attorney General, 463, 279, 251, 609, 724; 21 Opinions of Attorney General, 201, 172.

The Secretary of the Treasury is not called upon to render legal advice to persons claiming compensation under the war risk insurance act, or for injuries caused by operation of railroads under Federal control, and for these reasons I must decline to answer this question.

Respectfully,

H. M. DAUGHERTY,
Attorney General.

Hon. A. W. MELLON,
Secretary of the Treasury,
Washington, D. C.



IN THE
Supreme Court of the United States

No.

ARTHUR J. DAHN,
Petitioner,

vs.

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS OF
THE UNITED STATES,
Respondent.

PETITION OF ARTHUR J. DAHN FOR WRIT OF
CERTIORARI.

*To the Honorable, the Supreme Court
of the United States:*

The petition of Arthur J. Dahn, respectfully shows
to the Court as follows:

1. He is a citizen of the United States and a resident of Dubuque County in the Northern District of Iowa, of which State he is a citizen.

2. On the 22nd day of November, 1918, he filed in the District Court of the United States in and for the Northern District of Iowa, Eastern Division, a suit against the Director General of Railroads of the United States, in which he claimed damages in the

sum of twenty thousand (\$20,000) dollars, for personal injuries sustained by him while engaged in the performance of his duties as a railway mail clerk on a railway mail car attached to a train being operated on the lines of the Illinois Central Railroad Company, while said railway was then under the direction and control of the Director General of Railroads by virtue of the Acts of Congress and proclamation of the President of the United States thereunto empowering him.

3. In his petition filed in said District Court your petitioner charged certain acts of negligence by the said railway company in the construction of its road, and other acts of negligence by the Director General of Railways in its maintenance and operation, and invoked the jurisdiction of the Federal Court because of diversity of citizenship.

4. Said Director General in his answer contended:

(a) That the suit involved an action against the United States Government which was not liable in such a suit.

(b) That petitioner, being an employee of the United States, had, prior to the commencement of the action, applied for and received benefits under the Federal Employees Compensation Act, and that this had constituted an election to proceed exclusively under that Act, and barred his right to recover in this suit.

(c) That any recovery which might be had in this suit would be a recovery from the United States Government, and under the terms of said Compensation Act the amount of such recovery would have to be refunded to the Government, so that in no event could petitioner benefit thereby.

4. Petitioner demurred to the portions of the answer setting forth the above contentions, and the said District Court sustained the petitioner's demurrer thereto, to which ruling the respondent excepted. Issue was thereupon joined and the case was tried before a jury resulting in a verdict for the plaintiff in the sum of Seven Thousand Five Hundred (\$7,500) Dollars, and judgment was, on the first day of August, 1919, entered on said verdict with interest and costs.

5. The case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, which Court on the second day of August, 1920, reversed this judgment with costs, and remanded the case to the said District Court with directions to dismiss your petitioner's complaint. On the third day of October, 1920, a mandate was issued out of said Circuit Court of Appeals pursuant to said judgment.

6. Your petitioner is advised that the said Circuit Court of Appeals was in error in reversing said judgment of the District Court and in ordering the said petition to be dismissed, but that on the contrary it should have affirmed the said judgment.

7. Your petitioner presents herewith in accordance with the rules of practice, a transcript of the record in said Circuit Court of Appeals, together with his assignment of errors and brief in support of his said petition.

8. Your petitioner further says that Walker D. Hines, named as plaintiff in error in the proceedings in the said United States Circuit Court of Appeals, has ceased to be the Director General of Railroads of

the United States, and that pursuant to law the President of the United States has appointed John Barton Payne as his agent to be substituted for the said Walker D. Hines in pending actions, suits and proceedings, so that the same shall not abate.

The premises considered your petitioner respectfully prays:

1. That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court, to the end that said cause may be reviewed and determined by this Court as provided by law.

2. That the name of the said John Barton Payne may be substituted in the place of the said Walker D. Hines, Director General of Railroads.

3. And that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

ARTHUR J. DAHN,

By

WALTER C. CLEPHANE,
J. WILMER LATIMER,
Attorneys.

Supreme Court, U. S.

FILED

NOV 1 1920

JAMES D. MAHER;
CLERK.

IN THE
Supreme Court of the United States

No. **60,166**

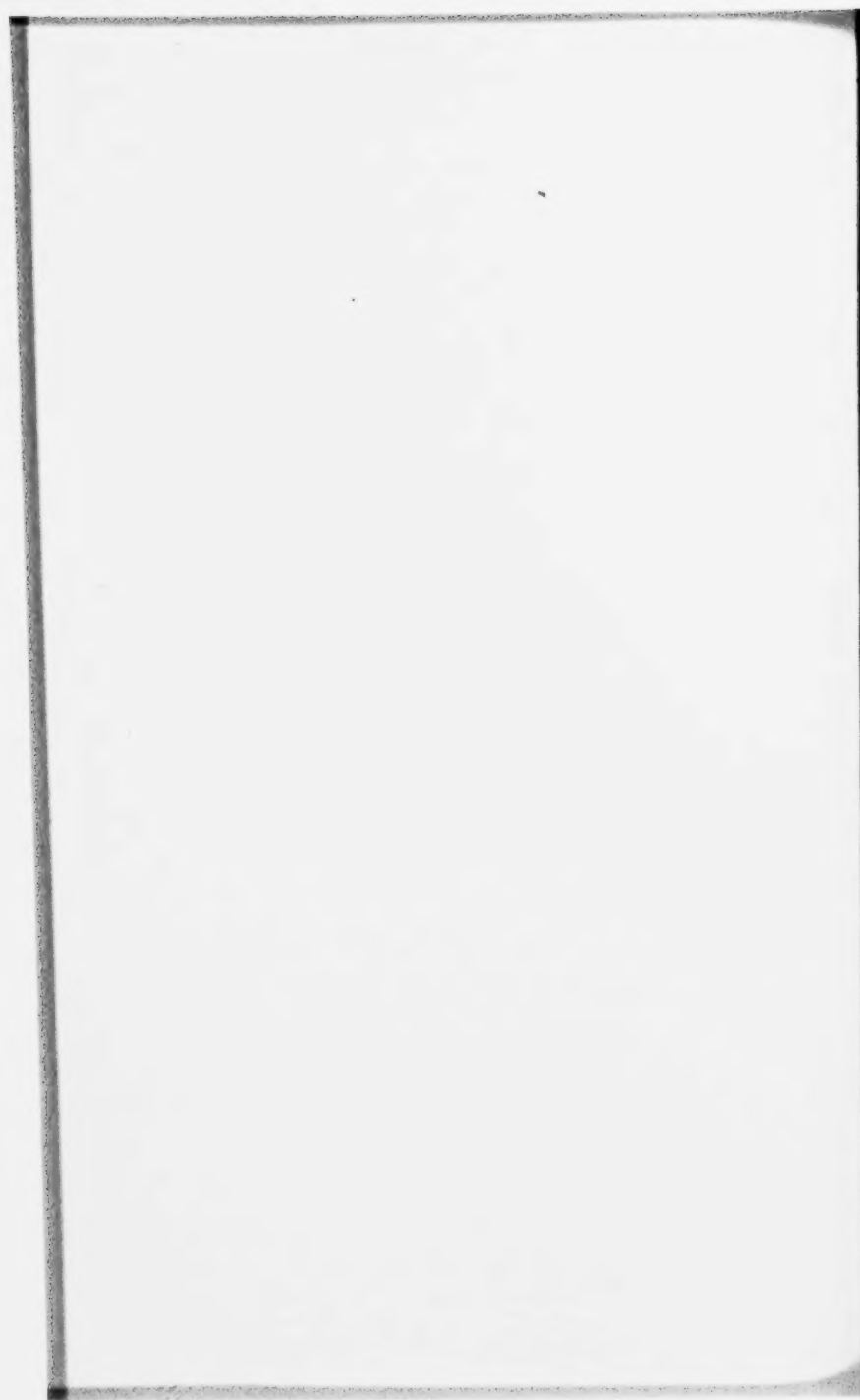
ARTHUR J. DAHN,
Petitioner,

vs.

WALKER D. HINES,
Director General of Railroads of the United States,
Respondent.

BRIEF OF PETITIONER
ON PETITION FOR WRIT OF CERTIORARI.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
Attorneys for Petitioner.



INDEX.

	Page
Statement of Facts.....	1
Assignment of Errors.....	3
Argument	4
Effect of Decision	5
Suit is against United States?	11
Employee does not benefit from recovery in Suit	13
Election of Remedies	15, 16, 22
History of Legislation	17
Difference between Federal Compensation Act and others	23
Exhibit A—Letter from United States Employees Compensation Commission	28

STATUTES CITED

Federal Employees Compensation Act ..	6, 7, 13, 14, 22
Federal Control Act	6, 16
General Order No. 50 of Director General	17

TABLE OF CASES CITED.

Barry v. Bay State Ry. Co., 222 Mass., 336, 110 N. E., 1031	24
Catawissa, The, 257 Fed., 863	12
Clapp v. Am. Ex. Co., 125 N. E., 162	12
Corpus Juris Treatise	24
Cripp Case, 296 Mass., 586, 104 N. E., 565	24
Dampskilbs v. Hustis, 257 Fed., 862	12
Franke v. C. & N. W. R. G., 173 N. W., 701	12
Gowan v. McAdoo, 173 N. W., 440	12
Hatcher & Snyder v. A. T. & S. F. R. Co., 258 Fed., 952	11
Haubert v. B. & O. R. R. Co., 259 Fed., 361	11
Huckle v. Council, 26 T. L. R., 580	24
Jensen v. L. V. R. R. Co., 255 Fed., 795	12
Johnson v. McAdoo, 257 Fed., 757	12
Lancaster v. Keebler, 217 S. W., 1117	12
Lavelle v. N. P. R. Co., 172 N. W., 918	12

	Page
McGravey v. Ind. Oil Co., 156 Wis., 580, 148 N. W., 895	24
McGregor v. G. N. R. Co., 172 N. W., 841.....	12
McLeod v. N. E. Tel. & Tel. Co., 250 U. S., 195....	12
M. P. R. Co. v. Ault, 216 S. W., 3.....	12
Mahomed v. Maunsell, 1 Butt. Work. Comp. Cas., 269	24
Mardis v. Hines, 258 Fed., 945.....	11
Mulligan v. Dick, 41 Scott. L. R., 77.....	24
Murray v. North Brit. Ry. Co., 41 Scott. L. R., 383	24
Nash v. South. Pac. Co., 260 Fed., 280.....	11
N. P. R. R. Co. v. Dakota, 250 U. S., 135.....	12
Oliver v. Nautilus Steamship Co., 2 K. B., 639...	24
Owens v. Hines, 100 S. E., 617.....	12
Oyler v. C. C. C. & St. L. Ry., 17 Ohio L. R., 356..	12
Page v. Burtwell, 2 K. B., 758.....	24
Paylo v. N. P. R. Co., 175 N. W., 687.....	12
Pawlak v. Hayes, 162 Wis., 503, 156 N. W., 464..	24
Postal Tel. Co. v. Call, 225 Fed., 850.....	12
Public Service Com. v. N. E. Tel. & Tel. Co., 232 Mass., 465	12
Ringquist v. D. M. & N. R. Co., 176 N. W., 344...	12
Rutherford v. Union Pac., 254 Fed., 880.....	11
Sagona v. Pullman Co., 174 N. Y. S., 536.....	12
Shade v. Ashgrove Lime, Etc. Co., 92 Kans., 146 139 Pac., 1193	26
South. Cotton Oil Co. v. Atl. Coast Line Ry. Co..	11
Tong v. Great North. R. Co., 86 L. T. Rep., N. S., 802	24
Turnquist v. Hannon, 219 Mass., 560, 107 N. E., 443	26
U. S. v. Kambeitz, 256 Fed., 247.....	11
Wade v. Seaboard Air Line Co., 257 Fed., 138	12
Westbrook et al. v. Director General of Railroads 263 Fed., 211	11
Witherspoon v. Postal etc., Co., 257 Fed., 758	12
Woodcock v. London etc., R. Co., 3 K. B., 139	24
Workmen's Compensation Act	24

IN THE
Supreme Court of the United States

No. —.

ARTHUR J. DAHN,
Petitioner,

vs.

WALKER D. HINES,
Director General of Railroads of the United States,
Respondent.

BRIEF OF PETITIONER
ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Petitioner, a railway mail clerk in the employ of the United States Government, brought this action against the Illinois Central Railway Company and the respondent, the Director General of the Railroads of the United States, to recover damages for personal injuries sustained May 29, 1918, while petitioner was engaged in the performance of his duties on a mail car on the lines of the Illinois Central Railroad Company while the

same was being operated under the direction of the Director General of Railroads. The negligent acts charged were:

(a) The dangerous and unsafe construction and maintenance of a railway bridge at the point where the accident occurred.

(b) The operation of the train at an excessive and unsafe rate of speed.

(c) The failure to adequately patrol the track and give proper warning of its dangerous condition.

The suit was dismissed as against the Illinois Central Railroad Company on the ground that under the Act of Congress placing the railroad under Federal control and under the general orders issued by the Director General of Railroads, suits could not be brought against a railroad company which was being operated by the United States. (R., 4, 9.) Plaintiff recovered a verdict against the respondent in the sum of Seven Thousand Five Hundred Dollars (\$7,500). (R., 203.) The petition invoked federal jurisdiction on the ground of diversity of citizenship. Respondent in his answer contended (R., 23-25, 273, 274):

(a) That this suit involved an action against the United States Government which is not liable in such a case as the present.

(b) That the plaintiff, being an employee of the United States, had, prior to the commencement of the action, applied for and received the benefits of the Federal Employees Compensation Act, and that this had constituted an election to proceed exclusively under that Act and barred his right to recover in this suit.

(c) That any recovery which might be had in this suit, would be a recovery from the United States Government and under the terms of the Federal Em-

ployees Compensation Act the amount of such recovery would have to be refunded to the Government, so that in no event could the petitioner benefit thereby.

The District Court sustained petitioner's demurrer to the portions of the answer setting forth the above contentions (R., 26-30-32), to which ruling the respondent excepted. (R., 30, 32.)

Respondent appealed from the judgment of the District Court based upon the verdict of the jury, to the United States Circuit Court of Appeals for the Eighth Circuit (R., 213-215), and that court on August 2, 1920, reversed the judgment below, and remanded the case with directions to dismiss the complaint. (R., 285, 286.)

ASSIGNMENT OF ERRORS (R., 287-288).

1. Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the District Court of the United States for the Northern District of Iowa, and in remanding the case with directions to dismiss the complaint of the plaintiff.

2. Said Circuit Court of Appeals erred in not affirming the judgment of the United States District Court aforesaid.

3. Said Circuit Court of Appeals erred in holding and deciding that this action is in legal effect a suit against the United States Government and not against the carrier corporation under Federal Control, that is, the Illinois Central Railroad Company.

4. Said Circuit Court of Appeals erred in holding and deciding that the term "carrier" or "carrier under Federal Control" as used in Section 10 of the Federal Control Act of March 21, 1918, does not mean or include the corporate entity, that is, the carrier corpora-

tion, in this case, the Illinois Central Railroad Company.

5. Said Circuit Court of Appeals erred in holding that plaintiff, having applied for and received compensation under Chapter 458 of the 1st Session of the 64th Congress, 39 Statutes, page 742, is barred from maintaining this suit.

6. The said Circuit Court of Appeals erred in holding and deciding that as to the United States the Employees Compensation Act aforesaid is exclusive of the right to sue the carrier under Federal Control if the employee (in this case the plaintiff) elects to pursue the remedy under it and he cannot pursue any other remedy.

7. Said Circuit Court of Appeals erred in rendering judgment against this plaintiff in error (former defendant in error) for costs of suit in said Circuit Court of Appeals.

ARGUMENT.

These assignments of error may be condensed into the statement that the United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the judgment below, by deciding that *a railway mail clerk who had presented to the Federal Employees Compensation Commission a claim under the Federal Employees Compensation Act and received the allowance of such a claim, had thereby made an election of remedies and was barred from suing the Director General of Railroads for compensation for injuries received while engaged in the performance of his duties upon a train operated under his direction.* (R., 283, 289.) The Court in reaching the above conclusion decided the following propositions:

A.

That the suit was one against the United States.
(R., 280-281.)

B.

That even if not a suit against the United States, a recovery against a person other than the United States would not inure to petitioner's benefit, but that the full amount of his recovery must be paid into the United States Treasury, so that the plaintiff would receive nothing other than his compensation under the Compensation Act. (R., 283.)

EFFECT OF DECISION.

Attached hereto and marked "Exhibit A" is a communication from the Federal Employees Compensation Commission indicating the importance of a decision by this Court upon the questions here involved. Inasmuch as the War Risk Insurance Act as amended (40 St., 609) is almost identical, in respect to the provisions now under consideration, with the Federal Employees Compensation Act, the administration of that act by the War Risk Insurance Bureau is necessarily similarly affected.

It is well-known that it has been the uniform practice of both of these bureaus of the Government to inform claimants that they have the right not only to claim compensation under the Acts by virtue of which these bureaus respectively operate, but that they may, in addition, pursue their common law or statutory remedy against those responsible for injuring these employees, and that many suits have been brought and are now pending, and many claims are

pending upon which suits have not been brought, which will be barred should the decision in this case remain unreversed. This practice has arisen by virtue of the language of the two statutes which were construed by the learned Court below.

Under the provisions of Sections 26 and 27 of the Compensation Act, the Commission may require the beneficiary to assign to the United States any right of action he may have to enforce the liability of another person, or the Commission may require the beneficiary to prosecute the action in his own name. Any recovery in such action shall be applied (1) to refund to the United States any compensation paid or to be paid the beneficiary on account of the injury which is the subject-matter of the action, and (2) the surplus shall be paid the beneficiary (39 Stat., Chap. 458, page 742).

To determine what right of recovery there may be for injuries received on railroads under the operation of the Director General of Railroads, resort must be had to Section 10 of the Act of March 21, 1918, known as the Federal Control Act (40 Stat., 451). This Act provides:

“That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. *Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier*

is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control." (Italics ours.)

The scope of the compensation allowed under the Compensation Act, is very much more restricted than that authorized under the Common law. Under the Act disability compensation can be paid (with certain minor exceptions) *only during the continuance of the disability*, and even if the disability be *total*, the compensation *cannot exceed 66 2/3% of the employee's monthly pay* (unless the monthly pay is under \$33.33, in which case the compensation may equal the pay), *and in no event may the compensation exceed \$66.67 monthly*. (39 Stat., Chap. 458, p. 742, Secs. 3-6.) Even in case of death resulting from the injury the compensation paid is only a fraction of the salary *based upon a maximum salary of \$100*. (Sec. 10.)

As illustrative of the hardships of the rule of law laid down by the learned Court below, the following cases taken from the records of the United States Employees Commission are pertinent:

James Robert Wheeler, employed at Camp Meade, was injured by the overturning of an automobile, necessitating *amputation of his leg above the knee*.

Compensation was paid for twenty-three days, amounting to \$51.11, and at end of that time he was given employment at his previous salary, which discontinued his compensation. Under the rule announced, even if successful in a suit against the tort feisor, *the Government would receive the entire proceeds of the judgment for its own benefit exclusively.* So also in the following:

William D. Hapgood, while working in the Springfield Armory, was injured to such an extent as to lose an eye. He was paid for nine days disability, \$16.50, and then returned to his former occupation.

Dave Parker, injured at Fort Sam Houston, lost his hand by amputation. His compensation amounted to \$17.78, in addition to which forty-five days leave was granted.

John S. Holmes, Jr., injured at Galveston, Texas, completely lost the vision of one eye. Leave for thirty-one days was granted and *no compensation whatever made*, because he was restored to his position.

Archie A. McCallum, injured at Puget Sound Navy Yard, lost three fingers and part of a fourth. Total compensation of \$35.56 was paid.

Frederick A. Porter, injured at Federal Building, Bellingham, Washington, lost his right hand. He took thirty-two days' leave which was due him, and the only compensation awarded was the payment of his medical bills and the cost of an artificial limb, as he then returned to his work.

These illustrations might be multiplied indefinitely. They are sufficient to indicate the hardships which will result if the decision below is permitted to stand, and the injured person deprived of all compensation other than what he may receive under the Compensation Act.

The beneficiaries of the War Risk Insurance Act, the provisions of which in this respect are almost identical with the Compensation Act, are likewise affected by the decision sought to be reviewed. For example:

Suppose a widow claiming the benefits of the Act, has received certain monthly payments allowed her under it. She has also recovered a large judgment against the party responsible for her husband's death. After receiving a few monthly payments she remarries. Heretofore it has been the practice for the Bureau to relinquish to her all of the judgment in excess of the amount due her under the War Risk Act. Hereafter that practice must be reversed and *the Government must retain the entire amount of the judgment* though it may have been collected from a third party. And it may be pertinently asked whether it will not now be the duty of the War Risk Bureau to take proceedings to recover back any moneys so paid to such beneficiaries, such sums amounting, as they must, to hundreds of thousands of dollars.

The importance of this case from the public standpoint is thus apparent.

What the case means to petitioner will be seen from the following facts:

He was performing his duties in the mail car in the middle of the night, when suddenly there was a crash, the electric lights went out and he became unconscious. When consciousness returned, he found himself suspended underneath the window partly out. He testified (R., 39): "The first thing I noticed was an awful burning underneath my arms and something pinning me in the back and the shrieks of the men that died. It was very dark * * *. I was suffering intense pain." His subsequent suffering, the extent of

his injuries, and the treatment administered, are set forth in detail in his testimony. (R., pp. 38-46.) Of the eight men (R., 38) who were in the mail car three died from their injuries (R., 76).

His pay at the time of the accident was \$1,600, including an allowance of \$100 for bed, etc. (R., 43). The maximum compensation which he can receive under the Compensation Act is \$66.67 monthly, or \$800 per year. (Sec. 6.) Even this pittance ceases the moment he is able to return to work and secures employment at a salary equivalent to the amount he was receiving prior to the accident; and, if his salary be not equal to that received prior thereto, his compensation, fixed by the act, is but $66 \frac{2}{3}\%$ of the difference.

For those elements, therefore, that enter into a jury's award in the common law action for negligence, viz.: physical pain and suffering, mental anguish, compensation for permanent disfigurement, maiming or disability, and loss of earnings, the effect of the decision below is to deprive the petitioner, and other persons similarly situated, of all compensation save for a portion of his lost earnings; and any recovery by a government employee, on account of physical and mental suffering and of the disability sustained, from any third person or corporation whose negligence was the cause thereof, would not inure at all, under the decision below, to the benefit of the sufferer, but the whole would be covered into the Treasury of the United States.

The attention of the Court is now invited to the principles announced by the Court below as the basis for its conclusions:

A.

That the suit is in effect one against the United States.

The Court said (R., 280):

“We are of the opinion that the present action was one in effect against the United States and that they will be obliged to pay the judgment below if sustained.”

Unless the Court reached this conclusion it could not have arrived at the further conclusion that the petitioner by accepting the benefits of the Compensation Act, elected to waive his right to sue the Director General and thus barred himself from that remedy. It does not, on the other hand, follow that the affirmative solution of this proposition necessarily leads to the conclusion that such bar was created. But as the negative solution of this question is an insuperable obstacle to the final result reached, the question merits the most careful consideration.

Without attempting at this time on a mere application for a writ of *certiorari*, to argue the merits of this debatable point, its difficulty will be apparent from the following extract from the Court's opinion (R., 280, 281):

“There are well reasoned cases in the Federal Courts sustaining the views herein expressed. They are *Rutherford v. Union Pac.*, 254 Fed., 880; *U. S. v. Kambeitz*, 256 Fed., 247; *Mardis v. Hines*, 258 Fed., 945; *Haubert v. Baltimore & Ohio R. R. Co.*, 259 Fed., 361; *Nash v. Southern Pacific Co.*, 260 Fed., 280; *Westbrook, et al., v. Director General of Railroads*, 263 Fed., 211; *Hatcher & Snyder v. A. T. & S. F. Ry. Co.*, 258 Fed., 952; *South-*

ern Cotton Oil Co., v. Atlantic Coast Line Ry. Co., and Wade v. Seaboard Air Line Co., 257 Fed., 138; Sagona v. Pullman Co., 174 N. Y. S., 536; Oyler v. C. C. C. & St. L. Ry., 17 Ohio L. R., 356; Public Service Commission v. New England Telegraph & Telephone Co., 232 Mass., 465; McLeod v. New England Telegraph & Telephone Co., 250 U. S., 195; N. P. Railroad Co. v. State of North Dakota, 250 U. S., 135. There are other decisions construing Sec. 10 as providing for the bringing of actions against the carrier corporation just the same as if no Federal Control had taken place. The cases cited as deciding that it is the carrier corporation that must be sued are, Postal Tel. Co. v. Call, 225 Fed. 850; Jensen v. L. V. R. Co., 255 Fed., 795; Johnson v. McAdoo, 257 Fed. 757; Witherspoon v. Postal, etc., Co., 257 Fed., 758; The Catawissa, 257 Fed., 863; Dampskilbs v. Hustis, 257 Fed., 862; Lavelle v. N. P. R. Co., 172 N. W., 918; Gowan v. McAdoo, 173 N. W., 440; Palyo v. N. P. R. Co., 175 N. W., 687; Ringquist v. D. M. & N. R. Co., 176 N. W., 344; McGregor v. G. N. R. Co., 172 N. W., 841; Franke v. C. & N. W. R. Co., 173 N. W., 701; M. P. R. Co. v. Ault, 216 S. W., 3; Lancaster v. Keebler, 217 S. W., 1117; Clapp v. Am. Ex. Co., 125 N. E., 162; Owens v. Hines, 100 S. E., 617.

"It would serve no useful purpose to review these cases. *It is conceded that most of them declare the law contrary to the conclusion reached in this case, but the reasoning upon which the decisions are based is not persuasive.*" (Italics ours.)

One of the cases above cited as sustaining the proposition that placing the railroads under Federal control did not necessarily involve a suit against the United States for injuries committed while the railroad was under such control was Postal Tel. Co. v.

Call, *supra*, decided in the Circuit Court of Appeals for the 5th Circuit. So that there are now contrary opinions expressed by two of the Circuit Courts of Appeals, and the other Federal Courts as well as the State Courts are in hopeless conflict, *with the decided weight of authority against the view adopted by the Court below in this case.*

This irreconcilable difference among the authorities, and the importance of the question involved, are believed to justify the petitioner in asking that this Court review this case and make its authoritative decision of the question.

B.

That any recovery of damages by a party who has availed himself of the benefits of the Compensation Act goes to the United States, and the employee realizes nothing.

It is respectfully submitted that this conclusion was neither a necessary nor logical step to the final result reached by the Court. But the conclusion once reached made the whole case merely a moot one, and was doubtless the reason for the very brief and unsatisfactory manner in which the Court expressed its final views as to the proper disposition to be made of the case.

No decision has been found by either a court or ministerial officer, by an auditor or comptroller, in which the statute has thus been construed. Indeed, the language of the statute is so plain that, with all due respect to the wisdom of the court below, it would seem that the statute must have been inadvertently misread by the Court. The Act (Secs. 26-27, 39 Stat., 742), provides for two situations, 1st; the resort by

the beneficiary to the Compensation Act prior to suit, in which case the Commission may require him to assign his right of action to the United States; and 2d; the resort to the Compensation Act after recovery by suit, compromise or otherwise.

In the first case the amount realized by the Commission as the result of the assignment and prosecution of the action shall be applied in the following manner:

"After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employee's compensation fund, *the surplus, if any, shall be paid to the beneficiary* and credited upon any future payments of compensation payable to him on account of the same injury." (Italics ours.)

In the second case it is provided that

"Such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employee's compensation fund."

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

Thus the law expressly requires the United States in the first case *to refund to the beneficiary all the recovery except the amount paid him under the Compensation Act*, and in the second case, *permits the beneficiary to retain all except what is due him under the Compensation Act*. And yet the Court says (R., p. 283):

“It plainly appears from the statute above quoted that whether the employee assigns his cause of action against a person other than the United States to the United States, and the same is prosecuted by said Commission or whether the employee prosecutes the cause of action himself, *the employee gains nothing but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employees are paid or is retained by the employee and the amount thereof is credited to the United States on future payments. So that in any event the employee realizes nothing from the liability of a person other than the United States. In this very case the plaintiff would receive nothing if he should collect his judgment other than his compensation under the Compensation Act.*” (Italics ours.)

This expression is incomprehensible to petitioner, in view of the unambiguous language of the Act. But having reached this viewpoint, it is not remarkable that the vital point in the case (which in the mind of the Court had become purely a moot question) should have received little consideration. That point is this:

C.

Did the application by petitioner for the benefits of the Compensation Act, and the allowance of the ap-

plication, bar him from suing the Director General of Railroads?

It is respectfully contended that even assuming the correctness of the Court's conclusion that a suit against the Director General is a suit against the United States, it by no means follows that the petitioner is barred from his remedy, because

1st. *Section 10 of the Control Act expressly provides to the contrary.*

2nd. *If the language of Section 10 is ambiguous, the history of the legislation can be resorted to and shows that such a result was never so intended.*

3rd. *There is nothing in either the Control Act or the Compensation Act to require an election.*

4th. *The Federal Employees Compensation Act differs in important particulars from the legislation of the States and the English and Scotch Acts cited by the Court.*

1st. *Section 10 of the Control Act expressly saves the remedy.*

It provides (40 Stat. 451):

“That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal Control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.”

The Federal Control Act was followed by General Order No. 50 of the Director General of Railroads, dated October 28, 1918, (R., 7, 8) which ordered

“That actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claims for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal Control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise.”

It is plain, therefore, that there can be no defence to this suit based upon the sole ground that it is a suit against the United States, and the learned Court below so held. (R., 279.)

2. *History of the Legislation.*

Should it be contended that there is any ambiguity about Section 10 so as to leave doubt as to whether the sovereignty of the United States was waived, the debates before the Committees of Congress clearly show that it never was the intent of Congress to deprive those injured on railroads of any right theretofore possessed by them.

When the Act was pending before the Committee of Interstate and Foreign Commerce of the House of Representatives of the 65th Congress, second session, extensive hearings were had, the report of which is contained in a volume issued from the Government

Printing Office entitled: "Federal Operation of Transportation Systems. Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, January 8th to 29th, 1918."

The Act under consideration was drawn up by Honorable George W. Anderson, Commissioner of Interstate Commerce, at the request of the Government itself. During the extensive hearings on the subject he stated in answer to a question from Judge H. S. Cowan of Fort Worth, Texas (page 786).

"Everything which is not inconsistent with the Federal Control, with this Act or with the Act of August 1, 1916, or with any order of the President made under either of these acts—all the rest of the law remains unchanged."

On pages 904-5 he says (referring to the language incorporated in Section 10 as above quoted):

"That covers all cases tort or contract. It amounts to saying that except as otherwise provided by general or special order, the Government adopts the carrier corporations as agents for carrying on the operation under Federal Control, and leaves rights and remedies to arise as they now arise."

And at page 910, he again says:

"You cannot go further or state it more plainly or briefly than I have stated when I put in the first five lines of Section 11 that except as otherwise provided by Congress or by the President—for that is what it means—these carriers remain individual carriers, subject to all existing liabilities, whether they arise under statutes or under common law."

The Congressional Record, 65th Congress, 2nd Session on H. R. 8172, in so far as the same applies to hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, discloses that the committee had before it the question of retaining or striking out a section then proposed, known as Section 9, designed to secure to railroad employees the right to receive compensation under the Federal Compensation Act as Government employees. The whole field of possible suits against the carriers under Federal Control upon causes of action arising during such Control was gone over but especially with reference to the right of railroad employees to sue for injuries. (See House Com. Report, pages 57 to 115; also pages 574 to 589; and 687 to 703.)

Mr. Doak, a representative of the Brotherhood of Railway Trainmen, appeared before the Committee to protest against the provision for compensation because it contained language making it exclusive of "all other rights and remedies of the person injured, his personal representatives, dependents, or next of kin, either at common law or by statute, whether Federal or State, against either the carrier or the United States on account of such injury or on account of the disability or death resulting therefrom." There was a long discussion, at the end of which Mr. Doremus of the Committee, produced Section 11 of the proposed bill which had been in the meantime changed to a form practically identical with Section 10 of the Act as finally passed. This Section 11 read as follows.

"Section 11. That carriers while under Federal control, shall, in so far as is not inconsistent therewith, or with the provisions of this act, or any other act applicable to such Federal Control, or

with any order of the President, be subject to all laws and liabilities as common carriers, whether arising under statutes or at common law; and suits may be brought by and against such carriers and judgment rendered, as now provided by law."

Then this dialogue ensued:

Mr. Doremus. Then with section 9 stricken out, the rights of the employees upon railroads in this country—their right of action in all our courts, both common law and statutory—will be preserved as fully as those who are seeking redress for injuries to private property?

Mr. Doak. That is our position.

Mr. Dewalt. Let me ask, Mr. Doremus, that section 11 has been changed from what the original bill was.

Mr. Doremus. This is the proposed section.

Mr. Doak. Is it broader than the other one, so it covers the point we were discussing.

Mr. Dewalt. I have not seen that new provision.

Mr. W. M. Clark. The fact of the matter is, Mr. Chairman, we just about had time to read section 9, and it was so different from the other section that we concentrated all our thoughts on that.

Mr. Barkley. This section as it is now proposed meets the contentions of you gentlemen with reference to the rights to sue for personal injury, does it not?

Mr. Doak. Yes sir; I think so.

Mr. Barkley. And eliminates the necessity for the original section 9?

Mr. Doak. Yes, sir; I think so. I think that is absolutely preserved under that.

Mr. Decker. Under section 11 as now written?

Mr. Doak. Yes, sir.

Mr. Snook. These words, "be subject to all laws and liabilities as common carriers, whether arising under statutes or at common law," will cover your case?

Mr. Doak. Yes; it is very materially changed. I didn't know that, because I read the old draft and have not had time to go over that at all. It answers all the questions, so the objection we have is that we don't want our present status interfered with, and by striking out section 9, with this provision in section 11—which I am certainly obliged to Mr. Doremus for calling my attention to—striking out section 9 I think we now have every thing just as it was before—all our rights preserved. Therefore, we will appreciate very much your consideration of that.

The Chairman. But you want the new section 9 stricken out?

Mr. Doak. We want section 9 stricken out of the bill.

The Chairman. And nothing substituted for it.

Mr. Doak. Nothing substituted for it.

It is not practicable to attempt further quotations from the record of these hearings, but it shows that the question of the right of railroad employes to sue for injuries received while the roads were under Federal Control was thoroughly considered. And we cannot believe that anyone, after reading this record of the hearings before the House Committee and considering the text of Section 10 of the Act as it finally passed, will doubt that its framers intended to make it broad enough to permit railroad employes (even though they became technically employes of the Government) as well as anyone else who suffered an injury because of the negligence of employes of railroads under Federal Control, to resort to the courts for redress just as they could before the roads were placed under such Control.

3. *There is nothing in the Control Act or Compensation Act to require an election.*

When the Compensation Act was passed there was no liability against the United States for torts committed by the Government. Obviously, therefore, there was no occasion to insert in the Act any provision to the effect that the reception of benefits under it was a waiver of any right of action against the United States. The Act did, however, carefully preserve the rights of beneficiaries thereunder to present claims and to institute suits against defendants other than the United States, even to the extent of permitting the Commission to require the beneficiary to assign to it any such claim, conferring authority upon such Commission to thereafter prosecute or compromise such claims. (Section 26, 39 Stat., p. 747.) It is true that Section 7 of the said Act is in the following language:

So long as the employee is in receipt of compensation under this Act, or if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which said installment payments would be continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever, except pension for service in the Army or Navy of the United States.

Plainly this does not prevent a claim being made against the United States, because it only precludes the making of such a claim (if such a claim could be made) "as long as the employee is in receipt of compensation under this Act," or "until the expiration of the period during which such installment payments would be continued." At the end of these periods he is left free

to pursue any remedy he might have had, if any such existed.

It is clear, therefore, that at the time the Federal Control Act was passed, the petitioner, a railway mail employee, had the right to sue the Illinois Central Railroad Company for any injury which might result to him from its negligence. Section 10 of the Act definitely allowed actions to be brought against carriers and "judgments rendered as now provided by law;" and enacted that "in any action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government." This section would seem to clearly indicate that the rights theretofore existing in Federal employees to sue railroad companies were not affected by the Railroad Control Act. Confirmation of this view is shown by the debate before the Committees of Congress hereinabove referred to.

Unless, therefore, there is something in the general purpose of the Employees Compensation Act, or something which by necessary implication is to be read into that Act, to bar the petitioner's remedy by reason of his acceptance of benefits thereunder, it is submitted that the learned Court below erred in its conclusions in this regard. And this brings us to the discussion of the fourth point which is,

4th.

The Federal Employees Compensation Act differs in important particulars from the legislation of the States and the English and Scotch Acts cited by the Court.

The Court says (R., 284-285):

“That the employee cannot recover both damages and compensation is sustained by the following cases, *Barry v. Bay State St. Ry. Co.*, 222 Mass., 366, 110 N. E., 1031, 1032; *Turnquist v. Hannon*, 219 Mass., 560, 107 N. E., 443; *Cripp’s Case*, 216 Mass., 586, 104 N. E., 565, Ann. Cas. 1915B 828; *Pawlak v. Hayes*, 162 Wis., 503, 156 N. W., 464; *McGravey v. Independent Oil, etc., Co.*, 156 Wis., 580, 146 N. W., 895; *Woodcock v. London, etc., R. Co.*, (1913) 3 K. B., 139, 6 *Butterworth’s Workmen’s Compensation Cases*, 471; *Page v. Burtwell* (1908) 2 K. B., 758, 1 *Butterworth’s Workmen’s Compensation Cases* 267; *Oliver v. Nautilus Steam Shipping Co.*, (1903) 2 K. B., 639, 5 *Minton-Senhouse’s Workmen’s Compensation Cases* 65; *Huckle v. Council*, 4 *Butterworth’s Workmen’s Compensation Cases* 113. (aff 3 *Butterworth’s Workmen’s Compensation Cases* 536, 26 T. L. R., 580; *Mahomed v. Maunsell*, 1 *Butterworth’s Workmen’s Compensation Cases* 269; *Murry v. North British R. Co.*, 41 *Scottish Law Rep.*, 383; *Mulligan v. Dick*, 41 *Scottish Law Rep.*, 77; *Tong v. Great Northern R. Co.*, 4 *Minton Senhouse’s Workmen’s Compensation Cases* 40, 86 L. T. Rep. N. S., 802; *Workmen’s Compensation Acts*; *Corpus Juris Treatise*.

It is submitted that none of the cases referred to sustain the proposition stated. It is believed that the Court was misled by the fact that in practically all of the *Workmen’s Compensation Acts*, including those referred to by the Court in its opinion, there is an express provision that acceptance of benefits under the Act constitutes a waiver of the right to sue. With regard to the usual *Compensation Act* it is plain that the employee has two remedies, one against the employer under the common law, in which case certain defenses are available to the employer, such as con-

tributory negligence, negligence of fellow servant, etc., and in which the plaintiff must prove negligence, and the other under the Compensation Act, in which the employer is deprived of these defenses and in which the employee recovers without proof of negligence. In the latter the compensation received by the employee is usually much less than would be received as the result of litigation, but the result is generally much more expeditiously reached. In the latter, too, the plaintiff has no right of trial by jury, while if he pursues his common law remedy, he has. It is, therefore, a feature common to these Acts that the resort to the remedy under the statute constitutes a waiver of the right to sue at law, and this is usually expressly so stated.

The situation is, however, very different with regard to the rights of employees against the United States. Unless it be established that a suit against the Director General of Railroads during the temporary control by the United States of such roads, is a suit against the United States, the employee never had a right of action against the United States for a tort committed. He did not have that right when the Compensation Act was passed. He does not have it now. His only remedy is under the Compensation Law.

It is contended that plaintiff can recover in this case because of the express provision of Article 10 of the Control Act which, as it has been shown, was never intended to and did not abrogate his rights under the Compensation Act. It is not required that the United States "pay both compensation and damages for negligence to the same person for the same injury," as suggested by the learned Court below. (R., 284.) Whatever damage he may recover against the tort feisor

inures to the benefit of the United States to the extent of any compensation paid the employee under the Act, so that in no event can the United States be harmed by the mere fact that the employee has availed himself of the benefits of the Compensation Act.

An examination has been made of all of the cases referred to by the Court as supporting its conclusion that an election has taken place here which has barred the plaintiff's remedy in this suit. In each of them there is an express statutory provision to the effect that the acceptance of benefits under the Act is a waiver of the common law right. For instance, Sec. 15 of the Massachusetts Act upon which the decision in *Turnquist v. Hannon*, *supra*, was based, enacts that "the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this Act, *but not against both*." 219 Mass., 560, 107 N. E., 443.

In *Shade vs. Ashgrove Lime, etc., Co.*, *supra*, also cited by the Court in support of its opinion, the Court said, construing the Kansas legislation there involved,

While it is true that such compensation acts do not exclude other remedies in the absence of provisions to that effect, yet by the terms of the statute itself, such remedies are excluded when both employer and employee are under its provisions. (Italics ours.)

92 Kans., 146; 139 Pac., 1193.

This citation, therefore, is a direct authority for the converse of the proposition decided by the learned Court below.

For the reasons stated the petitioner prays that this Court will issue to the United States Circuit Court of

Appeals for the Eighth Circuit a writ of certiorari commanding it to send up the record in this case in order that the same may be inquired into and the action of said Court reversed and set aside, and that your petitioner may have such other and further relief as the nature of the case may require and to the Court may seem proper.

.....

.....

WALTER C. CLEPHANE,
J. WILMER LATIMER,
Attorneys for Petitioner.

(Exhibit A follows on page 28.)

EXHIBIT A.

October 29, 1920.

MESSRS. CLEPHANE & LATIMER,
Attorneys-at-Law,
Wilkins Building,
Washington, D. C.

GENTLEMEN:

The United States Employees' Compensation Commission understands that Arthur H. Dahn, defendant-in-error in the United States Circuit Court of Appeals for the Eighth Circuit, is seeking through your office to secure a review by the Supreme Court of the United States of an adverse judgment by the Circuit Court of Appeals for the Eighth Circuit, in his suit against Walker D. Hines, Director General of Railroads.

While this Commission is not a party to that suit, it is, nevertheless, vitally interested in having the decision reviewed by the Supreme Court of the United States as the same affects the action of this Commission in a great many cases, arising under the Employees Compensation Act (39 Stat., 742).

We, therefore, trust that you may, in some proper way, make this fact known to the Court in your petition for a review of the decision of the Circuit Court of Appeals.

Very truly yours,

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

By FRANCES C. AXTELL,
Acting Chairman.